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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1953

No. 209

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, PETITIONER,

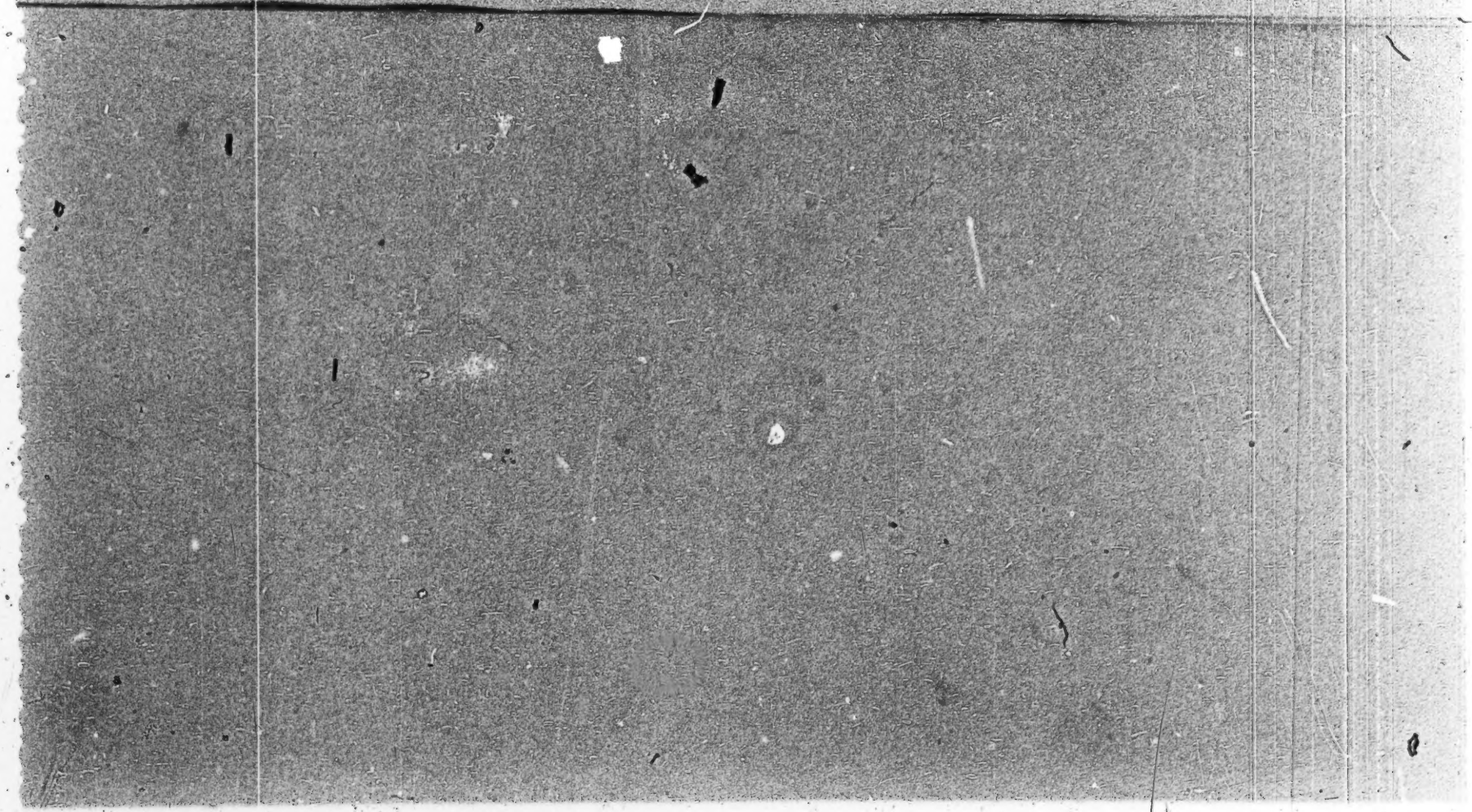
vs.

ARCHIE C. STUDE, WILLIAM LUMPKIN AND POTTAWATTAMIE COUNTY, IOWA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 27, 1953.

CERTIORARI GRANTED OCTOBER 12, 1953.



CONSOLIDATED RECORD

In the
United States Court of Appeals
FOR THE EIGHTH CIRCUIT

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
APPELLANT,
vs.
ARCHIE C. STUDE, WILLIAM LUMPKIN AND POTTAWATTAMIE COUNTY, IOWA,
APPELLEES.
(Notice of Appeal filed August 18, 1952.)
(Civil No. 1-81 in District Court.)
No. 14724

ARCHIE C. STUDE,
CROSS-APPELLANT,
vs.
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
CROSS-APPELLEE.
(Two Notices of Appeal, one filed in No. 1-81 and one in No. 1-101, from portion of consolidated order of July 23, 1952, overruling Motion to Remand.)
No. 14725

ARCHIE C. STUDE AND WILLIAM LUMPKIN,
APPELLANTS,
vs.
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
APPELLEE.
No. 14726

(Notice of Appeal filed Oct. 14, 1952, in No. 1-101, from portion of consolidated order of July 23, 1952, overruling motion to remand and order in No. 1-101 of September 17, 1952, overruling the Motion for Rehearing.)

APPEAL AND CROSS-APPEAL FROM UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA
WM. F. RILEY, JUDGE

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Pleas and proceedings in the United States Court of Appeals for the Eighth Circuit at the September Term, 1952, of said Court, before the Honorable Archibald K. Gardner, Chief Judge, and the Honorable Seth Thomas and the Honorable John Caskie Collet, Circuit Judges.

Attest:

E. E. KOCH,
Clerk of the United States Court of Appeals for the Eighth Circuit.

(Seal)

Be it Remembered that heretofore, to-wit: on the 22nd day of October, A. D. 1952, appeals from the United States District Court for the Southern District of Iowa were filed in the office of the Clerk of the United States Court of Appeals for the Eighth Circuit, in certain causes wherein Chicago, Rock Island and Pacific Railroad Company was Appellant and Archie C. Stude, William Lumpkin and Pottawattamie County, Iowa, were Appellees, Archie C. Stude was Cross-Appellant and Chicago, Rock Island and Pacific Railroad Company was Cross-Appellee, and Archie C. Stude and William Lumpkin were Appellants and Chicago, Rock Island and Pacific Railroad Company was Appellee.

Printed consolidated record, filed November 3, 1952, on which the appeals were heard in said Court of Appeals, is in the words and figures following, to-wit:

On March 7, 1952, Chicago, Rock Island and Pacific Railroad Company filed in the office of the Clerk of the United States District Court for the Southern District of Iowa, Western Division, the following

COMPLAINT

Plaintiff, for cause of action against defendants, states and shows the court as follows:

1. Plaintiff is a corporation organized under the laws of the State of Delaware and is a resident and citizen of said State. Defendants, Archie C. Stude and William Lumpkin, are individual citizens of the State of Iowa, and Pottawattamie County, Iowa, is a governmental subdivision, which is made a party defendant to this action because it is the holder of a tax lien on the properties hereinafter more particularly described. Plaintiff has duly qualified as a foreign corporation in the State of Iowa, and has secured a license or permit from the Secretary of State of the State of Iowa to do business as a foreign corporation within the State of Iowa.

2. The matter involved in this action exceeds in value the sum of $3,000.00, exclusive of interest and costs, and the controversy is wholly between citizens of different states.

3. Plaintiff has been authorized by certificate of the Interstate Commerce Commission to construct a new line of railroad extending generally between a point approximately .91 mile west of Atlantic, Iowa, in Cass County, to a point on the existing line of Chicago, Great Western Railway Company located near McClelland, Pottawattamie County, Iowa, and has been authorized by the Interstate Commerce Commission to enter into a trackage arrangement with Chicago, Great Western Railway Company for the use of its tracks between McClelland and Council Bluffs, Iowa. Plaintiff has been authorized by the Iowa State Commerce Commission to institute condemnation proceedings and to acquire by condemnation the lands more particularly hereinafter described.

4. On or about the 18th day of January, 1952, this plaintiff, pursuant to the provision of the Iowa statutes,

instituted a proceeding in eminent domain before G. R. Steelle, Sheriff of Pottawattamie County, for the assessment and appraisal of damages sustained by the taking of the following described lands located in Pottawattamie County, Iowa, for railroad purposes, to-wit:

> That part of the North Half (N½) of Section Twenty (20), Township Seventy-six (76) North, Range Forty (40) West of the Fifth P. M. in Pottawattamie County, State of Iowa, described as a strip of land One Hundred Fifty (150) feet in width, being Seventy-five (75) feet on each side of the relocated main track centerline of Chicago, Rock Island and Pacific Railroad Company as now staked and located over and across the North Half (N½) of the Northeast Quarter of said Section Twenty (20), and Two Hundred Fifty (250) feet in width, being One Hundred Twenty-five (125) feet on each side of said relocated main track centerline over and across the North Half (N½) of the Northwest Quarter (NW¼) of said Section Twenty (20), which relocated main track centerline is more particularly described as beginning at a point in the East line of said Section Twenty (20), Seven Hundred Sixty-two and Five Tenths (762.5) feet South of the Northeast corner thereof and extending Northwesterly in a straight line to a point in the West Line of said Section Twenty (20), Five Hundred Thirty-one and Eight Tenths (531.8) feet South of the Northwest corner thereof and containing in all Twenty-four and Forty-seven Hundredths (24.47) acres, more or less.

Said lands were at said time owned by defendant, Archie C. Stude, a citizen of the State of Iowa, and a resident of Pottawattamie County, in said State. Pottawattamie County, Iowa, was made a party defendant in said proceeding merely because it was the holder of a tax lien on the property to be appropriated and condemned for railroad purposes, and is a mere nominal party to said proceeding.

5. G. R. Stuelke, Sheriff of Pottawattamie County, appointed Commissioners to view the premises and assess the damages to the real estate owned by Archie C. Stude by reason of the taking of the lands hereinbefore described for railroad purposes. Said Commissioners filed their report in writing with the Sheriff of Pottawattamie County, Iowa, on February 13, 1952, by which said Commissioners assessed the damages to the real estate of Archie C. Stude at $33,000.00, and damages to William Lumpkin, the tenant on said real estate, at $1,000.00, by reason of the condemnation of the lands hereinbefore described.

6. On the 7th day of March, 1952, Chicago, Rock Island and Pacific Railroad Company duly appealed from the award and the assessment of damages by serving a notice of appeal upon G. R. Stuelke, Sheriff of Pottawattamie County, Iowa, Archie C. Stude, William Lumpkin, and Pottawattamie County, Iowa, a true copy of which notice is hereto attached marked Exhibit "A", and by this reference made a part hereof.

7. Archie C. Stude is the record owner of the following described premises, to-wit:

> The Northwest Quarter (NW¼) of the Northwest Quarter (NW¼); the Northeast Quarter (NE¼) of the Northwest Quarter (NW¼); the Northwest (NW¼) of the Northeast Quarter (NE¼); and the Northeast Quarter (NE¼) of the Northeast Quarter (NE¼), all in Section Twenty (20), Township Seventy-six (76) North, Range Forty (40) West, in Pottawattamie County, Iowa, containing in all approximately one hundred fifty-four acres, more or less.

The lands sought to be condemned lie in the center portion of the tract above described. The items of damage sustained by the lands of the defendant, Archie C. Stude, consist of the taking of 24.47 acres for railroad purposes and in severing the balance of the said tract. That the actual damages sustained by the lands of Archie C. Stude by reason of the appropriation of the 24.47 acres will not exceed $10,000.

8. The award of damages in the amount of $23,336.60 was and is grossly excessive, unreasonable, and far in excess of any actual damage which may be sustained to the lands and property of Archie C. Stude, by reason of the appropriation and taking of the lands hereinbefore described for railroad purposes.

9. There is filed herewith a transcript of the proceedings had before the Sheriff of Pottawattamie County, Iowa, in the proceeding before him pertaining to the lands hereinbefore described.

Wherefore, plaintiff prays that upon the trial of this cause the damages sustained by the lands of Archie C. Stude, by reason of the appropriation of the lands hereinbefore described, be fixed at not to exceed $10,000, and that plaintiff have such further relief as may be just and proper under the circumstances.

EXHIBIT "A"

of said Complaint was a

NOTICE OF APPEAL FROM ASSESSMENT OF DAMAGES

by Chicago, Rock Island and Pacific Railroad Company

This notice was addressed to G. R. Stuelke, Sheriff of Pottawattamie County, Iowa, and Archie C. Stude, William Lumpkin and Pottawattamie County, Iowa. It bore an acceptance of service by said sheriff on March 6, 1952, recited that the railroad company "has appealed and does hereby appeal from the award of damages made by Sheriff's Commissioners on or about February 12, 1952, in the amount of $23,336.60 for the taking and appropriation for railroad purposes of the lands described" in Par. 4 of the Complaint. It was signed by counsel for Chicago, Rock Island and Pacific Railroad Company, and recited that the appeal was taken to the United States District Court for the Southern District of Iowa, Western Division, and "will be docketed in the office of the clerk

of said court at Council Bluffs, Iowa, on or before the 7th day of March, 1952."

On the same date there was filed in the office of the clerk the following

TRANSCRIPT ON APPEAL

I, G. R. STUELKE, Sheriff of Pottawattamie County, Iowa, do hereby certify that on the 18th day of January, 1952, there was filed in my office an Application for condemnation by Chicago, Rock Island and Pacific Railroad Company, which applicant for condemnation stated that it is a corporation organized under the laws of the State of Delaware, duly qualified as a foreign corporation to do business in the State of Iowa, and is the owner of certain lines of railroad within the State of Iowa. Applicant further stated that it had been authorized by the Interstate Commerce Commission to construct approximately thirty-four (34) miles of new railroad line in Cass and Pottawattamie Counties, Iowa; that it had theretofore applied for and received from the Iowa State Commerce Commission authority to condemn and appropriate for railroad purposes certain lands more particularly described.

Said Application specifically stated:

"(6) Archie C. Stude, whose post office address is R. 1, Hancock, Iowa, is the record owner of the following described property, to-wit:

> The Northwest Quarter (NW¼) of the Northwest Quarter (NW¼); the Northeast Quarter (NE¼) of the Northwest Quarter (NW¼); the Northwest Quarter (NW¼) of the Northeast Quarter (NE¼); and the Northeast Quarter (NE¼) of the Northeast Quarter (NE¼), all in Section Twenty (20), Township Seventy-six (76) North, Range Forty (40) West, in Pottawattamie County, Iowa, containing in all approximately one hundred fifty-four acres, more or less.

William Lumpkin, whose post office address is RFD 1, Hancock, Iowa, is in possession of the real estate above described, and upon information and belief, applicant states that he occupies same as a tenant of the record owner. Pottawattamie County, Iowa, is a holder of a lien on the property above described for general taxes for the year 1951 due and payable in 1952.

Of the lands above described applicant seeks to condemn the following portion for railroad purposes, to-wit:

That part of the North Half (N½) of Section Twenty (20), Township Seventy-six (76) North, Range Forty (40) West of the Fifth P. M. in Pottawattamie County, State of Iowa, described as a strip of land One Hundred Fifty (150) feet in width, being Seventy-five (75) feet on each side of the relocated main track centerline of Chicago, Rock Island and Pacific Railroad Company as now staked and located over and across the North Half (N½) of the Northeast Quarter of said Section Twenty (20), and Two Hundred Fifty (250 feet in width, being One Hundred Twenty-five (125) feet on each side of said relocated main track centerline over and across the North Half (N½) of the Northwest Quarter (NW¼) of said Section Twenty (20), which relocated main track centerline is more particularly described as beginning at a point in the East line of said Section Twenty (20), Seven Hundred Sixty-two and Five Tenths (762.5) feet South of the Northeast corner thereof and extending Northwesterly in a straight line to a point in the West Line of said Section Twenty (20), Five Hundred Thirty-one and Eight Tenths (531.8) feet South of the Northwest corner thereof and containing in all Twenty-four and Forty-seven Hundredths (24.47) acres, more or less.

Of the lands above referred to four and fifty-six hundredths acres are located in the Northeast Quarter (NE¼) of the Northeast Quarter (NE¼); four and fifty-six hundredths acres in the Northwest Quarter (NW¼) of the Northeast Quarter (NE¼); seven and sixty-seven hun-

dredths acres in the Northeast Quarter (NE¼) of the Northwest Quarter (NW¼); and seven and sixty-eight hundredths acres in the Northwest Quarter (NW¼) of the Northwest Quarter (NW¼), all in Section Twenty (20), Township Seventy-six (76) North, Range Forty (40) West, in Pottawattamie County, Iowa."

On the 28th day of January, 1952, a notice of hearing before Commissioners was served by me on Archie Stude, William Lumpkin and Pottawattamie County, Iowa, copy of which notice is hereto attached and made a part hereof.

I do further certify that I appointed the following named persons, all resident freeholders of Pottawattamie County, Iowa, and not interested in the question presented in said Application, or in any similar question, as Commissioners to assess and appraise the damages; (Here follow the names of six Commissioners.)

I do further certify that the Commissioners above named viewed the premises hereinbefore described on the 12th day of February, 1952, at 9:30 o'clock a. m., and on said date filed in my office in writing as follows:

"AWARD OF COMMISSIONERS

We, the undersigned, Commissioners appointed by the Sheriff of Pottawattamie County, Iowa, to assess and appraise the damages to real estate in Pottawattamie County, Iowa, by reason of the condemnation of lands for railroad purposes by Chicago, Rock Island and Pacific Railroad Company, under the application filed in the office of the Sheriff of Pottawattamie County on January 18, 1952, do hereby make our report and award in writing as follows:

Pursuant to our appointment, each of the Commissioners so appointed by you, duly qualified on the 11th day of February, 1952, by taking and subscribing an oath in writing before the Clerk of the District Court of Pottawattamie County, Iowa, that each of us would to the best of his ability faithfully and impartially assess and appraise the damages to real estate in Pottawattamie County, by reason of the appropriation of lands for rail-

road purposes under said application, and make written report thereof to the Sheriff.

On the 12th day of February, 1952, at 11:00 A. M., we viewed the real estate described in subdivision (6) of paragraph 7 of the application for condemnation on file in the office of the Sheriff of Pottawattamie County, and heard the claims and statements of the applicant, record owner, Archie C. Stude, and William Lumpkin, tenant of the record owner. We do now and hereby report that we have assessed the damages to the real estate specifically described in subdivision (6) of paragraph 7 of the application, by reason of the appropriation and condemnation of the lands specifically sought to be condemned for railroad purposes, as follows:

For damages to the interest of Archie C. Stude, record owner, $23,868.60; for damages to the interest of William Lumpkin, tenant of the record owner, $1,000.00.

The award herein made is subject to the lien of Pottawattamie County, Iowa, for unpaid general taxes and any unpaid personal taxes of the record owner.

The above and foregoing award is made on the condition that applicant for condemnation shall construct and maintain an opening beneath any roadbed or track constructed on the premises eighty-four (84) inches in diameter to be located at the following described point, to-wit:

Approximately 1200 feet West of the East line of the real estate specifically described in subdivision (6) of paragraph 7 of the application.

The award herein made is subject to the lien of Pottawattamie County, Iowa, for unpaid general taxes and any unpaid personal taxes of Archie C. Stude, record owner.

In Witness Whereof, the undersigned, Commissioners, have hereunto subscribed their names at Council Bluffs, Iowa, this 13th day of February, 1952."

I do further certify that on the 6th day of March, 1952, there was served upon me a Notice of Appeal by

Chicago, Rock Island and Pacific Railroad Company, copy of which is hereto attached and made a part hereof, and that on the 7th day of March, 1952, I made service of said Notice of Appeal on Archie C. Stude and William Lumpkin by delivering to them a true copy thereof and offering to read to them the original, which they waived, in Pottawattamie County, Iowa, and that I served the Notice of Appeal upon Pottawattamie County, Iowa, by delivering a true copy thereof to Arthur W. Biesendorfer, County Auditor of Pottawattamie County, Iowa, and by offering to read to him the original, which he waived.

In Witness Whereof, I have hereunto set my hand this 7th day of March, 1952.

(Sgd.) G. R. Stuelke,
Sheriff of Pottawattamie County, Iowa

The Notice of Appraisal and Hearing Before Commissioners referred to in said transcript was in form required by the statutes of Iowa, was addressed to Archie C. Stude, William Lumpkin, Hancock, Iowa, and to Pottawattamie County, Iowa, and notified all persons interested that a Commission has been appointed as provided by law by the Sheriff of said County for the purpose of appraising the damages which will be caused to the lands described by the condemnation of the lands described (description same as in Par. 4 of Complaint).

Summons was issued by the Clerk of the United States District Court for the Southern District of Iowa on March 7, 1952, addressed to Archie C. Stude, William Lumpkin and Pottawattamie County, in the usual form, citing the defendants named "to answer the Complaint copy of which is herewith served upon you within twenty days after service of this summons upon you."

The Summons with return of service thereon was filed in the office of the Clerk of said Court on March 25, 1952. The return of service recited that the Summons was received by the marshal on March 17, 1952, and was

served together with copy of the Complaint upon each of the defendants on March 18th, 1952.

On March 24, 1952, there was filed in the office of the Clerk the following

MOTION TO DISMISS

Come now the defendants Archie C. Stude, and William Lumpkin, and for Motion to Dismiss plaintiff's complaint, respectfully state to the Court, as follows:

1. There is no statutory authority for an appeal to the United States District Court from the proceedings in eminent domain before the Sheriff of Pottawattamie County, as set forth in plaintiff's notice of appeal and complaint.

2. Plaintiff's notice of appeal and complaint show that plaintiff has heretofore elected its remedy by proceeding under Chapter 472 of the Code of Iowa, 1950, as alleged in paragraphs 4 and 5 of plaintiff's complaint, and the award of the condemnation jury has become final as provided by Section 472.17 of the Code of Iowa, 1950.

3. The amount of the award of the condemnation jury as set forth in the complaint, has been deposited with the Sheriff of Pottawattamie County, Iowa, as provided by Section 472.25 of the Code of Iowa, 1950, in order that plaintiff might obtain possession of said property as provided by said statute and said Sheriff holds said deposit subject to the provisions of Chapter 472, Code of Iowa, 1950, as shown by the affidavit of said Sheriff attached hereto and made a part hereof.

4. Plaintiff has heretofore elected to appeal from the award of the condemnation jury as set forth in the complaint to the District Court of Iowa, in and for Pottawattamie County, as provided by Chapter 472, Code of Iowa, 1950.

5. Plaintiff has filed a petition for removal of the appeal to the District Court of Iowa in and for Potta-

wattamie County, being Docket No. 1-101, to the United States District Court for the Southern District of Iowa, Western Division, and has elected to proceed as required by Chapter 472, Code of Iowa, 1950.

6. That this Court has no jurisdiction of the alleged claim set forth in the complaint.

AFFIDAVIT

State of Iowa, Pottawattamie County, ss.

I, G. R. Stuelke, being first duly sworn on oath depose and state:

That I am the Sheriff of Pottawattamie County, and have been such official at all times herein mentioned.

That on January 18, 1952, Chicago, Rock Island & Pacific Railroad Company instituted proceedings in accordance with the provisions of Chapter 472, Code of Iowa 1950, and filed written application for the condemnation of private property belonging to Archie C. Stude and William Lumpkin; and pursuant to said application and in conformity with the provisions of Chapter 472, Code of Iowa 1950, I caused to be appointed six (6) resident freeholders of Pottawattamie County, Iowa, as a Commission to assess and appraise the damages.

That I caused to be served upon Archie C. Stude and William Lumpkin, notice of hearing before said commissioners.

That pursuant to said application and notice, the commissioners appointed by me qualified pursuant to the provisions of Chapter 472, Code of Iowa 1950; and on February 12, 1952 said commissioners filed their written award in my office, at which time they awarded to Archie C. Stude, record owner, the sum of $23,886.00, and awarded William Lumpkin, tenant, the sum of $1000.00.

That thereafter and in the manner provided by Chapter 472, Code of Iowa 1950, Chicago, Rock Island & Pacific Railroad Company, paid into my office said damages so awarded by the commissioners; and that I hold in my hand check of the Chicago, Rock Island & Pacific Railroad Com-

pany, * * * for Archie C. Stude, in the amount of $23,-886.00, and William Lumpkin $1000.00.

G. R. Stuelke

(Duly verified.)

On March 24, 1952, there was filed in the office of the Clerk, by Defendants Stude and Lumpkin the following

ANSWER AND COUNTERCLAIM

Come now the defendants Archie C. Stude and William Lumpkin, subject to the ruling on their motion to dismiss, and in compliance with the Statutes of Iowa, and in answer to plaintiff's complaint, state:

DIVISION ONE

1. They admit paragraph 1, thereof.
2. They admit paragraph 2.
3. They admit paragraph 3.
4. They admit paragraph 4.
5. They admit paragraph 5.
6. They admit that plaintiff caused to be served upon them certain documents designated as notice of appeal.
7. Defendant Archie C. Stude admits that he is the owner of the real estate described in paragraph 7; he avers that same contains 160 acres; that 24.47 acres have been taken by the plaintiff and avers that he has been damaged thereby in a sum in excess of $32,000.00 as will be hereinafter set out.
8. They deny paragraph 8.
9. They admit paragraph 9.

DIVISION TWO

For further answer by way of counterclaim, these defendants state:

COUNT ONE

1. That the farm before described was for many years the home of Archie C. Stude and is now operated by Wil-

liam Lumpkin; said renter being the husband of his only child. That it has an excellent and modern house, with other valuable improvements, replacement value of which would be more than $20,000.00. That the same is on an all-weather road and at all times has been adapted and suitable for use and operation as a combination stock and grain farm and has been so used and operated continuously for many years.

2. That the said right-of-way cuts through substantially the middle of said farm, in a northwesterly direction. That all of the buildings are on the north side of the right-of-way, which takes part of his feed lot. That his farm, with said right-of-way through it, is divided into two strips each of which are a mile long and only about 500 feet wide.

3. That for the alleged purposes of shortening their line between Atlantic and Council Bluffs, Iowa, and of eliminating curves and grades, and to permit operation of trains at speeds of ninety or more miles per hour with greater safety to the operators and riders, and in order to operate more economically and to successfully compete with their competitors between Chicago and Denver, all of which was alleged to be impossible under present conditions, the plaintiff by condemnation proceedings under Iowa law and through the medium of a sheriff's jury, has taken the land and severed the farm as before stated.

4. That prior to the taking of said right-of-way, their farm was a one-man, stock and grain farm located on an all-weather road, had excellent school facilities and was a highly desirable farm on which to live, being equipped with all modern conveniences.

5. That by reason of the taking of said right-of-way, the defendants have sustained damages in the sum of $32,000.00.

6. That the defendant Archie C. Stude and the defendant William Lumpkin are operating said farm as a joint venture, and are doing so both as to livestock operation and to grain-raising operations.

7. That defendants allege that they are not able at this time to enumerate all of the items that go to make up the damages to the farm as a whole sustained by said condemnation but allege that among such are included the following items which are elements of damage reducing the value of the farm:

a. The taking by the plaintiff of 24.47 acres of the best land.

b. Making the farm absolutely unsalable to a large number of potential buyers by reason of the construction through the farm of a high-speed line and destroying all value as a home.

c. Requiring the taking out of production of a strip not less than one rod wide on each side of the right-of-way, containing at least four acres and increasing the labor and expense of cutting weeds along additional fences along the right-of-way.

d. Destroying defendants' source of water supply and making it necessary for him to supply water for livestock and other farm purposes upon the parcel of land south of said right-of-way.

e. Making the farm usable only as two separate units, one of which has no buildings. The farm buildings now being located on the tract of land one mile long and 500 feet wide north of the right-of-way and the remainder of the farm of the same size and shape is severed from said buildings.

f. Limiting and making difficult the free movement about the farm of portable buildings and machinery.

g. Rendering the farm a very undesirable place to live by reason of the noise, vibration, soot, dirt and danger to children and also by increasing the hazards of fire. That the vibration will greatly impair the use of electrical instruments and the sounds of the locomotives at all hours disturb the sleep of all occupants.

h. Place on the farm a constant and perpetual source of danger to everyone having occasion to go from the land on one side to the other and by limiting to careful and alert adults those who can be entrusted to drive live-

stock and haul portable buildings and machinery from one part to the other.

1. Increasing the danger and probability of infection to the farm of noxious weeds and plant and animal diseases.

2. Interference with drainage of the farm and making cultivating impossible because of the shape of the parcels remaining, creating ditches by diverting surface water into culverts instead of sheet run-off that encourages erosion.

3. Greatly increasing the cost and labor of operation.

4. Necessitating the very dangerous crossing of the railroad line many times each day in normal operations.

5. Decreasing the desirability of the farm to good tenants and operators and making it infinitely difficult to obtain and retain such.

6. Decreasing the rental and sale value of the farm.

7. Destroying the suitability of the land for a truck and grain farm.

8. By necessitating the travel between the land on each side of the railroad over one way or road way, thus increasing trouble and hindering and very seriously endangering such operations.

9. Defendant Armin C. Hinde requests a jury trial to answer his challenge.

COUNT TWO

1. That the defendant Western Longwall, at the time of the condemnation proceedings, was a tenant upon the real estate described below, that he was operating said farm as a joint venture with the defendant [illegible].

2. That in the alleged purposes of shortening their line between Atlantic and Council Bluffs, Iowa, and of eliminating curves and grades, and to permit operation of trains at speeds of ninety or more miles per hour with greater safety to the operators and riders, and in order to operate more economically and to successfully compete with their competitors between Chicago and Denver, all

[illegible]

4. That by reason of the taking of said right-of-way, defendant William Lumpkin has been damaged in the sum of $2500.00.

A. Defendant William Lamplin requests a jury trial to assess his damages.

Wherefore, defendants pray that defendant Archie C. Wade be allowed the sum of $[illegible] by reason of his damages as set out in Count One; that defendant William Lamplin be allowed damages in the sum of $[illegible] by reason of his damages as set out in Count Two; [illegible] and further pray that each be allowed interest on the amount awarded at 6% from February 18, 1965 and costs of this action including attorneys' fees for their attorneys.

Thereafter an Order was entered by the Court assigning

DEFENDANTS' MOTION TO DISMISS

for hearing at Des Moines, Iowa, on May 28, 1965, at which time the cause was orally argued and the parties were given until June 7, 1965 to file written briefs.

On January 14, 1965, the following

AFFIDAVITS

of Philip J. Wilson and G. E. Steele were filed in the office of the Clerk.

State of Iowa, Pottawattamie County, ss.

I, PHILIP J. WILSON, being first duly sworn on oath, depose and say that I am one of the attorneys for the defendants in the above entitled cause.

That on the 13th day of March, 1964, a Petition for Removal was filed in the office of the Clerk of the above entitled court, docketed as Civil Case No. [illegible], praying to remove to this Court herein a cause of action which had been instituted in the District Court of Iowa, in and for Pottawattamie County, Iowa, at Avoca, wherein the defendants herein are named as plaintiffs, and the plaintiff herein is named as defendant; that said action involves an appeal from the same award made by the Sheriff's Jury and the same lands as are involved in the complaint herein; that Notice of Appeal from said award

by the Sheriff's Deed of the District Court of Iowa in and for Pottawattamie County, Iowa, was served on the [redacted] day of March, 1962, and [redacted] transcript of the proceedings [redacted] filed with said District Court of [redacted] March, 1962, and that after the [redacted] entered the parties named as [redacted] and entered to demand said action to [redacted]

[redacted] Pottawattamie County, ss.

I, A. [redacted] being first duly sworn on oath, depose and say:

That I am the Sheriff of Pottawattamie County, Iowa, and [redacted] duly elected at all times hereinafter mentioned.

That [redacted] of the award entered in favor of [redacted] for the property involved herein by the Board of Conciliators on February 11, 1962, was [redacted] on February 28, 1962, under the provisions of Chapter 471 of the Code of Iowa, 1962.

[redacted]

On July 13, 1962, the Court filed and entered of record the following:

United States District Court, Southern District of Iowa, Western Division

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CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Plaintiff*, vs. WALTER KAY, et al, *Defendants.*	Civil Nos. 1-80 to 1-83, Inclusive, Civil Nos. 1-85 to 1-90, Inclusive,

and

ALVA F. CARBUHN, et al, *Plaintiffs,* vs. CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, et al, *Defendants.*	Civil Nos. 1-91 to 1-101, Inclusive, (Consolidated for Ruling) MEMORANDUM OPINION AND ORDER

There has been no order of consolidation of the twenty separate cases here involved, but since the motions to dismiss in ten of them and the motions to remand in the remaining ten make them companions, they will be treated as consolidated for the purpose of the motions and the present rulings thereon.

All of the cases are related to condemnation proceedings commenced by the Chicago, Rock Island and Pacific Railroad Company as condemnor of lands in Pottawattamie County taken under the power of eminent domain in the change of location of its line of railroad between Atlantic and McClelland, Iowa.

In January, 1958, pursuant to authority granted by the Iowa State Commerce Commission so to condemn (Sec. 471.10, Code of Iowa, 1950), the condemnor instituted proceedings under Chapter 472 of the Code of Iowa, 1950, by filing with the sheriff of Pottawattamie County a written application conformed to Sec. 472.2. The sheriff appointed a commission, which assessed the damages as to each tract involved and filed its written report with him. The ten tracts are owned by nine different property owners.

Condemnor served notice of appeal from the awards, as permitted by Sec. 472.18, docketing the several notices of appeal as ten separate cases in the District Court of the State of Iowa in and for Pottawattamie County. *Thereafter*, condemnor, under the claimed authority of Tit. 28, Sec. 1441(a), United States Code, filed in this

court petition for removal of each of the ten cases, which are docketed separately here. The petitions for removal are in the form. In each of these cases the landowner has filed a motion to remand, claiming in each that this court "is without jurisdiction either to determine or pass upon any further question" in the case, and that the appeal pending in the state court "is not removable to this court for the reason that the Chicago, Rock Island and Pacific Railroad Company is not the defendant in said action within the meaning of Section 1441 of Title 28, United States Code, so as to be entitled to remove said action." Contemporaneously with the motion to remand, each property owner has attempted to comply with Sections 472.21-.22 of the Iowa Code by filing what is denominated a "petition," in which the owner is designated as plaintiff, and which is filed "subject to the ruling on his motion to remand this action to the District Court of Iowa, and in compliance with the Statutes of Iowa." Sections 472.21-.22 are as follows:

> "472.21. *Appeals—how docketed and tried.* The appeal shall be docketed in the name of the owner of the land, or of the party otherwise interested and appealing, as plaintiff, and in the name of the applicant for condemnation as defendant, and be tried as in an action by ordinary proceedings."
>
> "472.22. *Pleadings on appeal.* A written petition shall be filed by the plaintiff on or before the first day of the term to which appeal is taken, stating specifically the items of damage and the amount thereof. The defendant shall file a written answer to plaintiff's petition, or such other pleadings as may be proper."

Prior to docketing in the state court the several appeals just described which were removed to this court, the condemnor caused to be served on the sheriff as to each tract of land involved a "Notice of Appeal from Assessment of Damages by Chicago, Rock Island and Pacific Railroad Company." It was addressed to the sheriff and the landowner, informed each of the con-

demnor's appeal, and recited: "Said appeal is taken to the United States District Court for the Southern District of Iowa, Western Division, at Council Bluffs, Iowa, and will be docketed in the office of the Clerk of said Court." These notices were docketed in this court, along with a complaint contemporaneously filed in each case, wherein the condemnor named itself as plaintiff and the landowner as defendant and alleged requisite diversity and amount in controversy, authority to construct the new line of railroad, appropriate authority from the Iowa State Commerce Commission to proceed by condemnation, the institution of the proceedings before the sheriff of Pottawattamie County, the appointment of the commissioners, their report and the appeal from the award and assessment of damages by serving the notice (a copy is attached to each complaint), a description of the premises involved, the actual damages claimed to be sustained by the taking of the lands and the award of the commissioners. A transcript of the prior proceedings is attached to the complaint. The prayer of the complaint is, "that upon the trial of this cause the damages sustained by the lands" be fixed at not to exceed an amount named and that the plaintiff have further "just and proper relief."

To each of these ten complaints filed as original suits in this court, the landowners, as defendants, filed motions to dismiss, asserting lack of statutory authority for the appeal to this court, the condemnor's previous election to proceed in the state court by instituting the proceedings before the sheriff as alleged in the complaint, with the consequent finality of the award of the condemnation jury, the deposit of the amount of the award with the sheriff to obtain possession of the property, the election to appeal from the condemnation award to the state court, the filing of the petition for removal from the state court to this court (as disclosed by the removal proceedings in the ten cases recited above), the consequent election to proceed as prescribed by the law of Iowa and that this court is without jurisdiction of the alleged claim. These respective motions to remand and

to dismiss were orally argued and written briefs have been filed.

The court will first consider the landowners' motions to dismiss the complaints in the ten cases originally docketed in this court as direct appeals from the commissioners' awards.

I.

The condemnor contends that before August 1, 1951 (the effective date of Rule 71A of the Federal Rules of Civil Procedure) the condemnor had the right of appeal from the award by the sheriff's commission directly to this court; that since August 1, 1951, Rule 71A(k) provides the specific procedure for the exercise of the right of such appeal. Subsection (k) is as follows:

> "*Condemnation Under a State's Power of Eminent Domain.* The practice as herein prescribed governs in actions involving the exercise of the power of eminent domain under the law of a state, provided that if the state law makes provision for trial of any issue by jury, or for trial of the issue of compensation by jury or commission or both, that provision shall be followed."

In support of the claimed right of direct appeal to this court, condemnor's counsel cite *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U. S. 239. That action was an original suit in equity by the mining company to enjoin the state court from proceeding to have lands condemned in a case instituted in the county court of Kentucky despite the fact of removal of the proceedings to the Federal Circuit Court. The Traction Company, authorized by law and its charter to construct an electric railroad, had filed its application in the County Court for appointment of commissioners to assess damages for the taking of private property. The Kentucky statutes prescribing this procedure provided for appeal by either party to the Circuit Court and trial de novo there by jury of the amount of compensation. Commissioners were appointed who made an award of $100.00 to the Mining

Company. Before any action on the award, the landowner petitioned for removal to the Circuit Court of the United States, alleging requisite diversity of citizenship and amount. The County Court refused to recognize any right of removal and was about to proceed when the landowner sued in equity in the Circuit Court of the United States for injunction. The Traction Company demurred to the bill, urging lack of jurisdiction and authority in the Circuit Court. The demurrer was overruled. The Traction Company elected to stand on the ruling. Injunction was issued enjoining the Traction Company from proceeding further in the County Court. The opinion is not authority for the condemnor's claim here. It recognizes that the proceeding commenced in the County Court, and removed to the federal court, was already a "suit" or "controversy between citizens of different States" within the meaning of the Constitution and laws of the United States. That is because the condemnation proceeding under Kentucky law was required to be commenced as a suit in the County Court. That court was asked to appoint commissioners to assess the damages to which the landowner was entitled. Such was the statutory method provided for condemnation. The opinion recognized that "After the removal of a case of condemnation from a state court the Federal court would proceed under the sanction of state legislation." Referring to judicial power to be exercised by the courts of the United States, the opinion said, at page 255:

> "In the exercise of that power a Circuit Court of the United States, sitting within the limits of a State and having jurisdiction of the parties, is for every practical purpose, a court of that State. Its function, under such circumstances, is to enforce the rights of parties according to the law of the State, taking care, always, as the State courts must take care, not to infringe any right secured by the Constitution and the laws of the United States."

It is true that the opinion overrode the contention that the case was not removable until it had been taken by

appeal from the County Court to the State Circuit Court where it would be "tried" de novo. This is understandable because of the previous expression in the opinion, p. 251, "that the case presented in the County Court was a 'suit' or 'controversy' between citizens of different States, within the meaning of the Constitution and the laws of the United States. It was, as already said, a judicial proceeding initiated in a tribunal which constitutes a part of the judicial establishment of Kentucky as ordained by its constitution, Const. Kentucky, Sec. 140; and the court, although charged with some duties of an administrative character, is a judicial tribunal and a court of record." Here the sheriff's commission, appointed under the Iowa statutes and from whose award the appeal is taken to this court, is but an administrative body and in no sense a judicial tribunal.

Considering statutes identical in substance, the Supreme Court of Iowa, speaking through Ladd, C. J., in *Myers vs. Chicago & N. W. Ry. Co.*, 118 Iowa 312, 315, said:

> "From these statutes it plainly appears that the proceeding before the commissioners appointed by the sheriff to appraise the land *is not a suit at law, but in the nature of an inquest to ascertain its value.* No hearing is had, and no evidence introduced. The commissioners merely inspect the land, determine upon the amount of damages which will be occasioned by the appropriation, and make a written report to the sheriff. Thus far then the proceeding *is in no respect a suit.*" (Emphasis supplied.)

The opinion further says, at page 316:

> "Unless in court, or before those exercising judicial functions, the proceeding cannot be regarded as a suit (citing cases). That the proceedings to condemn land is not a suit, within the language of the Removal Acts of Congress, and are such after the appeal to the district court, seems to be conclusively settled against the appellees in Boom Co. vs. Patterson, 98 U. S. 403, and Railroad Co. vs. Myers, 115

U. S. 1. See also Searl vs. School District, 124 U. S. 197. In the first cited case the court said, speaking through Field, J.: 'The proceeding in the present case before the commissioners appointed to appraise the land was in the nature of an inquest to ascertain its value, and not a suit at law, in the ordinary sense of those terms. But when it was transferred to the district court by appeal from the award of the commissioners, it took, under the statute of the state, the form of a suit at law, and was thenceforth subject to its ordinary rules and incidents. The point in issue was compensation to be made to the owner of the land,—in other words, the value of the property taken. No other question was open to contestation in the district court. Turner v. Holleran, 11 Minn. 253. The case would have been in no essential particular different had the state authorized the company, by statute, to appropriate the particular land in question, and the owners to bring suit against the company in the courts of law for its value. That a suit of that kind could be transferred from the state to the federal court, if the controversy were between the company and a citizen from another state, cannot be doubted.'"

Counsel for the condemnor argues that to avail itself of the exercise of the right of eminent domain granted to it by the State of Iowa, it pursued the administrative procedure provided by the laws of that State before it might come to this court, but that having progressed through the administrative procedure to the point of determination by the commissioners of the amount of the award for the taking of the land, it then had a controversy which, because of its diverse citizenship and the amount involved, permitted it to come by appeal directly to this court. It is believed that the authority upon which counsel relies for this statement is based upon situations where the condemnation proceedings were instituted in the county court or other tribunal which was a part of the judicial establishment of the state. The commission

of freeholders appointed by the sheriff is not a tribunal which is a part of the judicial establishment of the State of Iowa. It is a purely administrative body which, as said by Judge Ladd, conducts a proceeding in the nature of an "inquest" to determine the value of the land.

That such a condemnation body is not a court is also decided by the Court of Appeals of this Circuit. In 1909, the 33rd General Assembly of Iowa authorized the purchase of waterworks by cities under certain conditions. The valuation was to be determined by what was described as a "court of condemnation" to consist of three state district court judges appointed by the Supreme Court of Iowa. Such a "court" was appointed in connection with the proposed purchase of the local waterworks by the City of Des Moines, Iowa. Thereupon the water company, as plaintiff, filed its petition and bond for removal to the federal court, filing both in the Supreme Court and in the "court of condemnation." It then brought a separate action in the federal court to enjoin further proceedings, alleging that the Act and the appointment of the district court judges violated the Iowa Constitution, Article 5, Section 5, which provides that a district judge shall not "be eligible to any other office except that of judge of the Supreme Court, during the term for which he is elected." The complainant contended that the appointment of the district judges to sit in a "court of condemnation" was appointment of these judges to another office. A three-judge federal court denied the injunction. *Des Moines Water Co. v. City of Des Moines, et al*, 194 Fed. 557. On appeal, the Circuit Court affirmed. 296 Fed. 657. In commenting, the opinion said, p. 662:

> "There is nothing in this point. Although this body is called a court, the members thereof can be no more considered a judicial tribunal than can the six freeholders selected by the sheriff to perform similar duties."

As to the effect of removal to this court by notice to the court of condemnation, it was said:

"At the time the petition for removal was filed the proceeding was not then a 'suit,' within the meaning of the removal acts. * * * Kaw Valley Drainage Co. v. Metropolitan Water Co., 186 Fed. 315."

This is the only case found under Iowa procedure which appears to parallel the attempt of the condemnor to come to this court by direct appeal from the condemnation commission. The court can find no statutory or other satisfactory source of authority for such appeal. There is respectable authority for the proposition "that when a statute gives a new and extraordinary remedy, and directs how the right to the remedy is to be acquired or enjoyed, how it is to be enforced, the act should be strictly construed; and the steps pointed out for the enjoyment of the remedy provided should be construed as mandatory, rather than directory or optional." *Union Terminal Ry. Co. v. Chicago, B. & Q. R. Co.*, 119 Fed. 209, quoting at page 216 from *Lumber Co. v. Hubbert*, 112 Fed. 718-725. (The Union Terminal case, decided in 1902 by the Circuit Court of the Western District of Missouri, was before a circuit and district judge. It involved a motion to remand proceedings for condemnation which had been commenced in the State Circuit Court and removed to the federal court.) Certainly the remedy here given—i.e., the means to exercise the right of eminent domain by a private corporation with the consent of the State of Iowa—is a "new and extraordinary remedy." The law giving the remedy directs how it shall be enjoyed. That law is to be strictly construed. The State is granting a modicum of its sovereignty. This court surely may not add to or subtract from the State's grant of such an extraordinary privilege.

It is contended that the new Rule 71A(k) now provides authority for such a direct appeal to this court. But we have seen that the proceedings do not take the form of a suit or, as now provided, a "civil action," until appeal from the commissioners' award has been taken and filed in accordance with the Iowa statute. For Rule 71A(k) to be construed as providing the authority to remove by this notice of appeal to this court, it would

be necessary to find that the rule-making power had in effect amended Sec. 1441(a) of Title 28, U. S. C. After the promulgation of the rule by the Supreme Court and the expiration of the sixty-day period before its effective date, surely it may not be argued that the effect was so to amend Sec. 1441 as to include or describe as a "civil action brought in a state court" the kind of proceeding here involved. This court will construe it so only when Congress has acted by direct expression, not by implied acquiescence. This court has limited jurisdiction expressly defined by the Congress. This Congressional grant is to be strictly construed. It is said in *Shamrock Oil Corp. v. Sheets*, 313 U. S. 100, 109:

> "'Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.' Healy v. Ratta, 292 U. S. 263, 270; see Kline v. Burke Construction Co., 260 U. S. 226, 233, 234; Matthews v. Rodgers, 284 U. S. 521, 525; cf. Elgin v. Marshall, 106 U. S. 578."

There is another and, I believe, taken alone, a compelling reason why such an appeal is not and cannot be effective or permitted. The power of eminent domain appertains to and is an attribute of the right of sovereignty. It is to be exercised with due respect for constitutional rights and guaranties.

Iowa has delegated that power to those legislatively named when the authority is used for a declared purpose found to be in the public interest. It has so circumscribed the method of its use as to insure to its citizens due process of law and just compensation for the taking of their property.

The condemnor here availed itself of such delegated authority when it filed its application with the sheriff. The method of its exercise includes a right of appeal to the District Court of the proper county by any party aggrieved by the commissioners' award. It would be an unwarranted encroachment on the State's authority for this court to find and declare that the prescribed pro-

ceedings, despite their expressed and explicit detail, contemplate and permit an appeal from the commissioners' award directly to this court instead of to the court named by the General Assembly of Iowa.

When it filed its application for condemnation, this condemnor undertook to avail itself of the privilege of eminent domain delegated to it by the State of Iowa. If condemnor is to enjoy and exercise that privilege it must pursue the method which the State has prescribed for its use. After the prescribed administrative procedure is concluded, and when the matter has ceased to be an inquest to ascertain value and has taken the form of a civil action to be heard and determined in a court of justice, the situation and relationship of the parties then may permit a choice of the forum in which the judicial controversy may be determined. Then, and not until then, will the ordinary rules and incidents of a civil action apply. *Boom Co. v. Patterson*, 98 U. S. 403.

The Iowa statute, Sec. 472.20, provides for filing the appeal with the clerk of the State District Court, and if condemnor is to avail itself of the right of appeal and have the amount determined "as in an action by ordinary proceedings," it must follow the mode prescribed. There is nothing in the Iowa or the federal statutes, or in the adjudicated cases that we have found, or in Rule 71A, which permits a condemnor to bring the commissioners' award directly to this court for review by service of notice of appeal upon the sheriff and the landowner, as here attempted.

Therefore, the motions to dismiss the complaints in the ten actions separately docketed in this court will be sustained.

II.

The landowners seek to have remanded the ten cases brought here upon petition for removal from the State Court. They claim that this court is without jurisdiction and the cases may not be removed here because the condemnor is not the defendant within the meaning of Sec. 1441(a) of Tit. 28, U. S. C.

The landowners depend primarily on *Mason City R. R. Co. v. Boynton*, 204 U. S. 570. In that case, where four questions were submitted by the Court of Appeals of this Circuit, among which was the first proposition discussed in this memorandum, the court determined only one, which was stated thus: "Was the landowner a defendant within the meaning of the removal statute, when the suit was removed into the Circuit Court?" The opinion holds that the landowner was such a defendant and sustained the removal. In doing so the writer of the opinion said, after discussing a state decision urged to the contrary:

> "But this court must construe the Act of Congress regarding removal. And it is obvious that the word defendant as there used is directed toward more important matters than the burden of proof or the right to open and close. It is quite conceivable that a state enactment might reverse the names which for the purposes of removal this court might think the proper ones to be applied. In condemnation proceedings the words plaintiff and defendant may be used only in an uncommon and liberal sense. The plaintiff complains of nothing. The defendant denies no past or threatened wrong. Both parties are actors: one to acquire title, the other to get as large pay as he can. It is not necessary in order to decide that the present removal was right to say that the state decision was wrong. We leave the latter question where we find it. But we are of the opinion that the removal in this case was right * * *." (Emphasis supplied.)

It is true that the opinion held that in a board sense the railroad is the plaintiff because the institution and continuance of the proceeding depend upon its will. The opinion is authority for the statement that the designation given the parties by the state statute is not conclusive, nor is the alignment of the parties as made by the parties themselves binding on this court, and this court must construe the act regarding removal. The authority of the Boynton case is fully recognized and accepted. Twice before the question of removal by the con-

demnor, of proceedings commenced in the District Court of the State of Iowa has been considered and approved by this court. *Kirby v. D. & N. W. R. Co.*, 106 Fed. 651; *Rogerio v. Miss. Riv. Power Co.*, 202 Fed. 771. In each case this court overruled the motion to remand. In each case the landowner appealed to the State District Court from the commissioners' award and the condemnor instituted removal proceedings and came to this court. The Kirby case antedated the Boynton case. In his opinion my predecessor said, at page 554:

> "I add the statement—to me of little importance, and certainly not controlling—that the Iowa statute, in providing for the appeal, recites, 'The landowner shall be plaintiff and the corporation defendant.' I cite this to show that the company is at least called a defendant. But I think it is an actual defendant, in view of the situation of the parties before the state district court."

In answer to the contention of counsel for the landowners that "this was a kind of special proceeding, and one that could not have been brought in this court originally, and therefore cannot be removed here," the same judge said, at page 557:

> "The Iowa statutes provide that a railway may appropriate a right of way. It must first pay or secure the damages. It has paid, or should if it has not, the amount fixed by the commissioners. That debt, it has the right to enter upon and occupy the strip of land. Until that sum is increased by another tribunal having jurisdiction, such occupancy is good. When increased, such additional money must be paid. If it is finally, such decrease is withdrawn. Therefore the only controversy is as to damages, and, there being a controversy on that question, and such controversy being between citizens of Iowa and Pennsylvania on one side, as plaintiffs, and the company, which is a defendant, and citizen of Illinois, on the other side, and the amount in controversy exceeding the requisite sum, the case was

removed from the state court to this court; and the removal was effected and was complete when the petition and bond was filed. Nothing further was to be done, excepting to timely file in this court, and that was done."

It is to be observed that in the Boynton case the court said at page 160:

"Looked at as a whole, the Iowa statutes provide a process by which railroads and others may acquire land for their purposes which the owner refuses to sell. The first step is the valuation. Whether it is part of the case or not, it is a necessary condition to the proceedings in court. Against the will of the owner the title to the land is not acquired until the case is decided and the price paid. The intent of the railroad to get the land is the mainspring of the proceedings from beginning to end, and the persistence of that intent is the condition of their effect. The State is too considerate of the rights of its citizens to take from them their land in exchange for a mere right of action. The land is not lost until the owner is paid. Therefore, in a broad sense, the railroad is the plaintiff, as the institution and continuance of the proceedings depend upon its will. Hudson River Railroad & Terminal Co. v. Day, 54 Fed. Rep. 545." (Emphasis supplied.)

The emphasis in the foregoing quotes is significant. In the cases at bar the "taking" is accomplished. The condemnor has paid the award to the sheriff and is occupying the land. Therefore, the land is "lost" to the owner and the situation of the parties is completely changed from that which existed in the Boynton case. "The intent of the railroad to get the land" is no longer "the mainspring" of the proceedings. The condemnor (the railroad) has the land, and although it is the condemnor who has appealed from the award, the purpose of the landowner yet is "to get as large pay as he can." Nothing else will be before the court. As was said in the Kirby case, "The only controversy is as to damages," and it is between citizens of different states. Looking at

the position of the parties in the title and into the nature of the litigation and the relations of the parties to the lands in controversy, we find that the one nominally the plaintiff is in fact the plaintiff, and the one nominally the defendant is in fact the defendant. The plaintiff under the Iowa statutes, Sec. 472.11-28, files his written petition "stating specifically the items of damage and the amount thereof," and the defendant condemnor files a written answer thereto. It is true that the amount of the commissioners' award may be refused to plaintiff's detriment. But it is also true that the proceedings are open for an award against the condemnor for an amount in excess of that of the commissioners. The landowner is entitled to as large pay as he can get from the condemnor. For every practical purpose at time of removal in these cases at bar the condemnor is both nominal and actual defendant.

III.

The right to remove proceedings to this court applies to actions which could have been brought in this court in the first instance. Sec. 1441, Tit. 28, United States Code.

An action to condemn land is a civil action within the meaning of this section and may be brought in the federal court of the district in which the land lies. *Fremont v. Chicago M. & St. P. Ry. Co.*, 276 Fed. 370; *Boom Co. v. Patterson*, 98 U. S. 403.

We have the direct question, therefore, whether, requisite diversity and amount existing, Rule 71A now provides to this condemnor the means initially to proceed in this court. If it does, then has condemnor the option either to proceed as was done in these cases by filing its application with the sheriff of Pottawattamie County and pursuing the Iowa statutory remedies, and then coming to this court by removal proceedings after appeal to the State District Court from the award of the sheriff's commission; or, to proceed initially in this court by complaint filed here asking the appointment of commissioners to determine the amount of compensation, with consequent

right to either party to have the award redetermined by trial de novo of the issues before a petit jury."

It is recognized that Rule 71A is a rule of procedure and does not change substantive law. Tit. 28, Sec. 2072. It is declared in the order adopted April 30, 1951, by the Supreme Court, paragraph 2, that the new rule is "to govern condemnation cases in the United States District Courts." In subparagraph (a) it is stated that except as otherwise provided in this new rule, the Rules of Civil Procedure "govern the procedure for the condemnation of real and personal property under the power of eminent domain." If the action involves the exercise of the power of eminent domain under the law of the United States, then the trial is governed by subparagraph (h) of the new rule. If it involves the exercise of the power of eminent domain under the law of the state, then subparagraph (k) controls.

The effect of the rule, therefore, as I interpret it, is to provide for a condemnor undertaking to exercise the power of eminent domain under the law of a state, the means to proceed in this court in the first instance if jurisdiction resides here under Sec. 1332, Tit. 28, U. S. C. To hold otherwise would have the effect of depriving a citizen of another state of rights conferred upon him by Sec. 1332 to commence an action here. It would be equivalent to amending Sec. 1332 by inserting what we have underlined so that it would read thus: "The District Courts shall have original jurisdiction of all civil suits *except those involving the exercise of the power of eminent domain* where the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and is between: (1) Citizens of different states."

If it should be contended that the Iowa State Commerce Commission might condition its right to the issuance of the permit provided by Sec. 471.10 of the Code of Iowa, 1950, to require that a condemnor should initiate his proceedings by filing the application with the sheriff of the county in which the land is located, as provided by Sec. 472.3 of the Iowa statutes, the answer is, that if

the condemnor has the right to proceed in the first instance in the federal court, that right may not be taken away by a condition sought to be imposed by the Commerce Commission, or by the Legislature. That is clearly stated in *Traction Co. v. Mining Co.*, supra, p. 252:

> "Speaking generally, it is for the State, primarily and exclusively, to declare for what local public purposes private property, within its limits, may be taken upon compensation to the owner, as well as to prescribe a mode in which it may be condemned and taken. But the State may not prescribe any mode of taking private property for a public purpose and of ascertaining the compensation to be made therefor, which would exclude from the jurisdiction of a Circuit Court of the United States a condemnation proceeding which in its essential features is a suit involving a controversy between citizens of different States."

One having the right to come here initially in condemnation proceedings surely cannot go partly down the road of the state procedure and then cut across from the sheriff's commissioners' award to this court. There is no such path defined. It was said earlier in Division I that there is no authority for such action. It is perhaps better said that Rule 71A is authority *against* such action. Whether Rule 71A provides an *exclusive* remedy in a diversity case, and one failing to proceed initially in this court loses the right of removal by the election to pursue the state statutory procedure, may be arguable, but until it has been expressly declared to be an exclusive remedy this court is unwilling to deprive a nonresident of his right to come here under the authority granted by Sec. 1441(a) of Tit. 28, U. S. C.

To paraphrase *Traction Co. v. Mining Co.*, supra, page 253: "Under any other view a State, by its own tribunals, could deprive citizens of other States of their property by condemnation, without giving them an opportunity to protect themselves, in a National court, against local prejudice and influence."

IV.

In all candor, it should be said that the question of the right of removal of these cases has not lent itself to quick determination. A predecessor on this court may not have been inaccurate when he said "That there is no other phase of American jurisprudence with so many refinements and subtleties, as relate to removal proceedings, is known by all who have to deal with them." *Hagerla v. Miss. Rec. Power Co.*, 262 Fed. 771. The complications presented by the privileges extended to a condemnor by Rule 71A(k), and by the first impression created by reading of the opinion in the Boynton case, supra, combined to cause some rather extended research. The court has been mindful of the purpose of the Congress in providing for the right of removal. As expressed in the Traction Company case, supra, a purpose and effect is to protect the non-resident "against local prejudice and influence."

This court has found itself strongly persuaded by what was so well phrased by the late Walter H. Sanborn, Judge of this Circuit, when, speaking of the right of removal, he said in *Bostmen's Bank v. Fritzlen*, 135 Fed. 650, 655:

> "That right is of sufficient value and gravity to be guaranteed by the Constitution and the acts of Congress. If it exists, and the Circuit Court denies its existence, and remands or refuses to remove the suit, the error is remediless, and it deprives the petitioner of his constitutional right. If the right does not exist, and the court affirms its existence and retains the suit, the error may be corrected by the Supreme Court. An error that the aggrieved party may correct is less grievous than one that is without remedy. And the true rule is that motions to remand and for removal should be decided, not by the existence of doubts, but by the preponderance of the facts, the law, and the reasons which condition them, in view of the fact that the right to invoke the jurisdiction of the federal court is a valuable constitutional right, and an erroneous affirm-

ance of the claim to that right may be corrected by the Supreme Court upon a certificate of the question of jurisdiction, while an erroneous denial of the claim is remediless."

Orders for judgment of dismissal will be prepared and filed in Nos. 1-80 to 1-83, inclusive, and Nos. 1-85 to 1-90, inclusive. Orders overruling the motions to remand will be prepared and filed in Nos. 1-91 to 1-101, inclusive. Exceptions to adverse rulings will be allowed to all parties.

Signed at Des Moines, Iowa, this 19th day of July, 1952.

/s/ Wm. F. Riley,
United States District Judge

On July 23, 1952, the Court made and entered of record the following

ORDER

in said cause:

United States District Court, Southern District of Iowa, Western Division

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Plaintiff*, vs. WALTER KAY, et al, *Defendants*. (and other cases as here numbered)	Civil Nos. 1-80 to 1-83, Inclusive, Civil Nos. 1-85 to 1-90, Inclusive, ORDERS ON MOTIONS TO DISMISS

ALVA F. CARBUHN, et al,
Plaintiffs,
vs.
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, et al,
Defendants.
(and other cases as here numbered)

Civil Nos. 1-91 to 1-93, Inclusive,
Civil Nos. 1-95 to 1-101, Inclusive,

ORDERS ON MOTIONS TO REMAND

The above entitled actions came on for hearing before the court at Des Moines, Iowa, on the motions of the landowners to dismiss the within suits for condemnation of their lands, cases numbered 1-80 to 1-83, inclusive, and 1-85 to 1-90, inclusive, and to remand the actions to the District Court of Iowa, in and for Pottawattamie County, numbered 1-91 to 1-93, inclusive, and 1-95 to 1-101, inclusive.

A. B. Howland of the firm Gamble, Read and Howland of Des Moines, Ia., appeared for the condemnor Railroad Company, together with G. C. Wyland of Avoca, Ia.; Raymond A. Smith of the firm Peterson, Smith, Peterson, Beckman & Willson, of Council Bluffs, Ia., appeared for the landowners in cases numbered 1-80, 1-81, 1-82, 1-83, 1-86, 1-89, 1-91, 1-95, 1-96, 1-97, 1-100 and 1-101; John M. Peters of the firm of Hess & Peters, Council Bluffs, Ia., appeared for the landowners in cases numbered 1-85, 1-87, 1-92 and 1-99; and Daniel J. Gross of the firm Gross, Welch, Vinardi & Kauffman, Omaha, Nebr., appeared for the landowners in cases numbered 1-88, 1-90, 1-98 and 1-98.

Oral arguments were had and extensive briefs were submitted by the respective counsel and the court being advised finds that the above mentioned motions to dismiss should be sustained and the said motions to remand should be denied, as more fully set out in the court's

memorandum opinion and ruling on said motions, filed herein on July 19, 1952.

It is accordingly Ordered and Adjudged that said motions to dismiss in cases numbered 1-80 to 1-83, inclusive, and 1-85 to 1-90, inclusive, be and the same are hereby sustained, and said cases are dismissed.

It is further Ordered and Adjudged that said motions to remand in cases numbered 1-91 to 1-93, inclusive, and 1-95 to 1-101, inclusive, be and the same are hereby overruled. All parties except.

Signed at Des Moines, Iowa, this 23rd day of July, 1952.

s/ Wm. F. Riley,
United States District Judge

On July 23, 1952, there was entered by the Clerk of the Court a

JUDGMENT

by which the complaint of Chicago, Rock Island and Pacific Railroad Company was dismissed and judgment for the costs of the action was entered against it.

On August 18, 1952, Chicago, Rock Island and Pacific Railroad Company filed in the office of the clerk a

NOTICE OF APPEAL

directed to E. E. Posten, Clerk, and to Archie C. Stude, William Lumpkin and Pottawattamie County, Iowa, which recites that plaintiff appealed from the judgment entered on July 23, 1952, pursuant to the opinion and order dated July 19, 1952, to the United States Court of Appeals for the Eighth Circuit. With said notice of appeal there was filed a good and sufficient bond with corporate surety for costs upon appeal with penalty of Two Hundred and Fifty Dollars, which bond was approved by the clerk. Copies of the notice of appeal were mailed to

counsel for each defendant, and to Pottawattamie County, Iowa, which entered no appearance in this cause.

On August 22, 1952, there was filed in the office of the Clerk the following:

United States District Court, Southern District of Iowa, Western Division

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Plaintiff*, vs. WALTER KAY, et al, *Defendants.* (and other cases as here numbered)	Civil Nos. 1-80 to 1-83, Inclusive, Civil Nos. 1-85 to 1-90, Inclusive,
ALVA F. CARBUHN, et al, *Plaintiffs*, vs. CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, et al, *Defendants.* (and other cases as here numbered)	Civil Nos. 1-91 to 1-93, inclusive, Civil Nos. 1-95 to 1-101, inclusive, NOTICE OF CROSS-APPEAL AND APPEAL To be filed in 1-81

Notice is hereby given that Archie C. Stude, designated as defendant in Civil No. 1-81 and designated as plaintiff in Civil No. 1-101, hereby cross-appeals and appeals to the United States Court of Appeals for the Eighth Circuit from that portion of the consolidated Order en-

tered in the above entitled and numbered actions of July 23, 1952, overruling the Motion to Remand.

On September 25th, 1952, an order was entered by the Court extending the time for docketing the appeal in the office of the Clerk of the United States Court of Appeals for a period of seventy days from and after the filing of the notice of appeal.

On October 13, 1952, there was filed and entered in said cause the following

STIPULATION AND ORDER

It is hereby stipulated and agreed by and between the parties to the causes listed in the caption of this stipulation, by their respective counsel, as follows:

1. The causes referred to in the caption of this stipulation as numbers 1-80, etc., involve identical questions of law; the Complaints filed in each of said causes by C. R. I. & P. as plaintiff, and docketed in the said Court were and are identical in form, except as to the description of the particular lands sought to be condemned, the the description of lands owned by the particular landowner, the amounts awarded by the Commissioners appointed by the Sheriff of Pottawattamie County, Iowa, to assess and appraise the damages, and the amount which plaintiff C. R. I. & P. contends the assessment of damages should have been.

2. The causes referred to in the caption of this stipulation as Numbers 1-91, etc., involve identical questions of law and they involve the same parcels of land, the same landowners and the same commissioners awards as are involved in causes 1-80, etc. In each of said causes 1-91, etc., Notices of Appeal from the award of Commissianers appointed by the Sheriff of Pottawattamie County, Iowa, to assess and appraise the damages were served by C. R. I. & P. and said Notices of Appeal, together with the Sheriff's transcript were filed in the office of

the Clerk of the District Court of Iowa in and for Pottawattamie County at Avoca, on March 12, 1952. In each of said causes C. R. I. & P. filed a Petition for Removal, accompanied by a Bond in the office of the Clerk of the United States District Court for the Southern District of Iowa, Western Division, and notice of filing thereof was given to the landowner and to all other parties, and a copy of the notice of filing petition of removal with a copy of petition attached was filed in the office of the Clerk of the said State Court on March 12, 1952.

3. C. R. I. & P. has filed Notices of Appeal to the Court of Appeals for the Eighth Circuit in causes 1-80, etc., and, as appellant will docket its appeal in the United States Court of Appeals for the Eighth Circuit at St. Louis, Missouri, only in cause No. 1-81, and will include in the record in said cause the Complaint of C. R. I. & P. together with all exhibits therein referred to and filed therewith, including the transcript on Appeal as certified by G. R. Stuelke, Sheriff of Pottawattamie County, Iowa, Notice of Appraisal and Hearing before Commissioners, and the purported Notice of Appeal to the United States District Court for the Southern District of Iowa, Western Division, from assessment of damages, by C. R. I. & P.; the summons served on Archie C. Stude; the motion of the defendant Archie C. Stude, to dismiss said cause, and all rulings and orders of the Court, the Opinion of the Court in its entirety, and including the caption, and the Judgment in its entirety and including the caption entered in said cause and the Notice of Appeal.

4. The defendant landowners have served Notice of Cross-Appeals in each of the actions referred to in paragraph 1 herein, which will be included in the Record of the Appeal by Appellant, and said cross-appeals involve identical questions of law, and the said landowners have also filed appeals in Cause 1-91, et al. The defendant landowners as appellants in Causes No. 1-91, etc., will docket their appeal only in Cause No. 1-101. For the purpose of said Cross-Appeal in Cause No. 1-81 and said Appeal in Cause No. 1-101 there shall also be included

as part of the record referred to in Par. 3 hereof, the following: Notice of Appeal and Sheriff's Transcript on Appeal, to the District Court of Pottawattamie County, Iowa, by the C. R. I. & P. from the award of the Commissioners as to Archie C. Stude; Notice of filing of Petition of Removal in Cause No. 1-101; Petition of C. R. I. & P. for Removal in Cause No. 1-101; Motion to Remand filed by landowner Archie C. Stude in Cause No. 1-101; Motion for Rehearing filed by landowner Archie C. Stude in Cause No. 1-101; the Order of the Court overruling said motion for rehearing; and the Notices of Cross-Appeal and Appeal served and filed by the landowner Archie C. Stude in Causes Nos. 1-81 and 1-101.

5. The judgment of the United States Court of Appeals for the Eighth Circuit in Cause No. 1-81 as disclosed by the opinion of the Court and its mandate, or the judgment rendered by the Supreme Court of the United States and its mandate shall apply to each of the other causes docketed as Nos. 1-80, etc., with the same force and effect as if the opinion, judgment and mandate had been rendered and entered in each of said causes, and on request of any party on the rendition of the final judgment and issuance of mandate by the court finally determining the cause, the same judgment shall be entered by the Clerk of the United States District Court in each of said causes, and with the same force and effect as though each of said causes had been fully docketed in the office of the Clerk of the United States Court of Appeals for the Eighth Circuit, or in the Supreme Court of the United States, and the judgment entered in said Cause No. 1-81 had been entered in each of the other causes.

6. The C. R. I. & P. may file its Motions to Dismiss the Cross-Appeal and Appeal filed by counsel for Archie C. Stude, in Causes No. 1-81 and 1-101 and it is agreed that the said motions shall, subject to the approval of the Court, be consolidated for briefing and for hearing, and, if the said Motions to Dismiss are overruled or denied, the parties agree that, subject to approval of the Court, the Appeal in Cause No. 1-101 and the Appeal and Cross-Appeal in Cause No. 1-81 shall be consolidated

for hearing and briefing. The judgment of the United States Court of Appeals for the Eighth Circuit in Cause No. 1-101, as disclosed by the opinion of the Court and its mandate, or the judgment rendered by the Supreme Court of the United States and its mandate shall apply to each of the other causes docketed as Nos. 1-91, etc., with the same force and effect as if the opinion, judgment and mandate had been rendered and entered in each of said causes and, on request of any party on the rendition of the final judgment and issuance of the mandate by the Court finally determining the cause, the same judgment shall be entered in the office of the Clerk of the United States District Court in each of said causes numbered as follows: 1-91, etc.

7. Briefs or Consolidated Briefs may be filed in the United States Court of Appeals for the Eighth Circuit or in the Supreme Court of the United States by counsel for any of the landowners who are parties to any of the causes set forth in the caption of this stipulation, and such counsel, subject to the order of the Court, may orally argue the cause.

8. One executed copy of this stipulation shall be submitted to the Judge of the United States District Court for the Southern District of Iowa, for approval, and request that the same be filed of record in the office of the Clerk of said Court, and it is agreed that the Court shall make an order approving said stipulation and directing that same be filed of record, and this stipulation shall be included in the record on appeal herein.

9. It is stipulated and agreed that the record in all appeals referred to herein shall be included in a single printed Record of which one-half of the costs of printing shall be advanced by the Chicago, Rock Island and Pacific Railroad Company and one-half by the landowners herein, pending final taxation of costs herein on appeal.

10. This stipulation shall not prejudice the right of any party hereto to make additions to the Record on Appeal, in the event of any error or omission therein.

October 9, 1952.

The above was signed by counsel of record for all parties in the causes therein referred to.

ORDER OF COURT

And now on this 13th day of October, 1952, the above and foregoing stipulation having been presented to the Court, and the Court having examined same, and being fully advised, it is

Ordered that the said stipulation be and is hereby approved. And it is further

Ordered that each and every provision and stipulation therein contained shall be and become the order of this Court with the same force and effect as if restated herein. And it is further

Ordered that the Clerk of this Court is directed to proceed in accordance with the provisions of the stipulation in the further conduct of the causes set forth in the caption of this stipulation.

Sgd. Wm. F. Riley,
Judge of the United States
District Court

ADDITIONAL RECORD FOR CROSS-APPEAL AND APPEAL

of Archie C. Stude and William Lumpkin.

On March 12, 1952, Chicago, Rock Island and Pacific Railroad Company filed in the office of the Clerk of the United States District Court for the Southern District of Iowa, Western Division, the following

PETITION FOR REMOVAL

Chicago, Rock Island and Pacific Railroad Company, defendant in the above entitled action, respectfully states and shows the court:

1. That it is a railroad corporation organized under the laws of the State of Delaware, qualified to and doing business in the State of Iowa, and owning and operating

lines of railroad within the State of Iowa, including a line extending through the County of Pottawattamie in said State.

2. Archie C. Stude, plaintiff in the above entitled cause, is an individual citizen of the State of Iowa, residing in Pottawattamie County in said State.

3. On or about the 11th day of March, 1952, there was docketed in the office of the Clerk of the District Court of Pottawattamie County, Iowa, an appeal from the award made by the Sheriff's Commissioners, appointed by the Sheriff of Pottawattamie County to assess and appraise the damages by reason of the taking and appropriation of certain described lands owned by Archie C. Stude, which lands were required for railroad purposes. In said action Archie C. Stude seeks to recover from Chicago, Rock Island and Pacific Railroad Company the sum of $23,883.60 on account of damage to the lands owned by said Archie C. Stude, by reason of the appropriation of approximately 24.47 acres for railroad purposes.

Attached to this petition for removal is a true copy of all process issued and served and all pleadings filed therein.

4. As grounds for removal of said action to this court, defendant, Chicago, Rock Island and Pacific Railroad Company, states that the said action in which Archie C. Stude is plaintiff and Chicago, Rock Island and Pacific Railroad Company is defendant now pending in the Pottawattamie County, Iowa, District Court at Council Bluffs is a civil action wherein the matter in controversy exceeds the sum of $3,000, exclusive of interest and costs, and the controversy is wholly between citizens of different states, to-wit: between a citizen of the State of Delaware and a citizen of the State of Iowa.

5. Chicago, Rock Island and Pacific Railroad Company tenders and files herewith a Bond with good and sufficient surety thereon, conditioned that it will pay all costs and disbursements incurred by reason of the removal

proceedings, should it be determined that said cause was not removable, or was improperly removed to this court.

6. A written notice of the filing of this petition and the aforesaid Bond will be given to all adverse parties as soon as may be, and a copy of this petition will be promptly filed with the Clerk of the District Court of Pottawattamie County, Iowa.

Wherefore, Chicago, Rock Island and Pacific Railroad Company prays:

1. That this cause shall be held removed to this court and that this court take exclusive jurisdiction thereof.

2. That this court shall take such further procedure required or permitted by law in order to properly present the issues in this cause for trial, and that this cause be docketed in this court, and that such further proceedings be had as justice may require.

The above Petition for Removal was verified by B. A. Webster, Jr., one of counsel for defendant.

Attached to the petition for removal was a

NOTICE OF APPEAL FROM ASSESSMENT OF DAMAGES BY CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY

This notice was addressed to G. R. Stuelke, Sheriff of Pottawattamie County, Iowa; Archie C. Stude, William Lumpkin and Pottawattamie County, Iowa. It bore an acceptance of service by said sheriff on March 11, 1952, and recited that the railroad company "has appealed and does hereby appeal from the award of damages made by Sheriff's Commissioners on or about February 12, 1952, in the amount of $23,883.60 for the taking and appropriation for railroad purposes of the lands described" in the transcript on appeal. It was signed by counsel for Chicago, Rock Island and Pacific Railroad Company, and recited that the appeal was taken to the District Court of Iowa in and for Pottawattamie County, at Avoca, and "will be docketed in the office of the Clerk of said Court

at Avoca, Iowa, on or before the 13th day of March, 1952."

Attached to the Petition for Removal was a

TRANSCRIPT ON APPEAL

which was identical with the transcript on appeal hereinbefore set forth in this Record at pages 5-9, except that the transcript refers to the notice of appeal to the District Court of Iowa in and for Pottawattamie County, at Avoca, and the certificate recites that said notice was served on the Sheriff of Pottawattamie County on March 11, 1952, and by him served on Archie C. Stude, William Lumpkin and Pottawattamie County on the 12th day of March, 1952.

Included in the transcript on appeal was a

NOTICE OF APPRAISAL AND HEARING BEFORE COMMISSIONERS

which was identical in form with the notice hereinbefore referred to in this record at page 9.

NOTICE OF FILING PETITION FOR REMOVAL

in the proper statutory form was served on Archie C. Stude, William Lumpkin and Pottawattamie County, Iowa, on March 12, 1952, and a copy of the Petition for Removal was attached thereto.

A Notice of the Filing of the Petition for Removal and a copy of the Petition for Removal were filed in the offices of the Clerk of the District Court of Iowa in and for Pottawattamie County, at Avoca, on March 12, 1952.

On March 24, 1952, Archie C. Stude filed in the office of the Clerk of the United States District Court the following

MOTION TO REMAND

Comes now the plaintiff, and moves the Court for an order to remand the above entitled action to the District Court of Iowa in and for Pottawattamie County, and in support thereof shows to the Court, the following:

1. That the United States District Court for the Southern District of Iowa, Western Division, is without jurisdiction in this case to either determine or pass upon any further question, and that this court is, under the laws of the United States, required to remand said cause to the District Court of Iowa in and for Pottawattamie County.

2. That the filing of said petition for removal is premature and this court is without jurisdiction to entertain said petition, for the reason that as shown by the said petition for removal no petition or other pleadings have been filed by plaintiffs in the State Court which could be subject matter of any removal to the Federal Court.

3. That said appeal action now pending in the District Court of Iowa, in and for Pottawattamie County, as shows by the petition for removal herein, is not removable to this court, for the reason that the Chicago, Rock Island and Pacific Railroad Company is not the defendant in said action within the meaning of Section 1441 of Title 28, U. S. C., so as to be entitled to remove said action.

On March 24, 1952, Archie C. Stude and William Lumpkin filed in the office of the Clerk of the United States District Court the following

PETTTION

Come now the plaintiffs herein, and state:

1. That they are actually defendants but are designated as plaintiffs according to the Statutes of Iowa.

2. Subject to the ruling on their motion to remand this action to the District Court of Iowa, and in compliance with the Statutes of Iowa, they state their cause of action as follows:

COUNT ONE.

1. Plaintiff Archie C. Stude is the owner of the north one-fourth of Section Twenty, Township Seventy-six north, Range Forty west in Pottawattamie County, Iowa. That he is interested in the operation of said farm as a joint venture with William Lumpkin.

2. That the defendant instituted proceedings in eminent domain before the Sheriff of Pottawattamie County, Iowa, to acquire ownership and possession of a right-of-way through said real estate, the exact description of which is set out in its removal petition. That the Sheriff's commission filed its report on February 12, 1952 and allowed this plaintiff the sum of $23,888.00 as damages, and the defendant has caused documents to be served upon this plaintiff indicating its intention to appeal said award to this Court and also to the District Court of Pottawattamie County, Iowa.

3. That the farm before described was for many years the home of Archie C. Stude and is now operated by his son-in-law, William Lumpkin; that it has an excellent and modern house, with other valuable improvements, replacement value of which would be more than $20,000.00. That the same is on an all-weather road and at all times has been adapted and suitable for use and operation as a combination stock and grain farm and has been so used and operated continuously for many years.

4. That the said right-of-way cuts through substantially the middle of said farm, in a northwesterly direction. That all of the buildings are on the north side of the right-of-way, which takes part of his feed lot. That his farm, with said right-of-way through it, is divided into two strips each of which are a mile long and only about 500 feet wide.

5. That for the alleged purposes of shortening their line between Atlantic and Council Bluffs, Iowa, and of eliminating curves and grades, and to permit operation of trains at speeds of ninety or more miles per hour with greater safety to the operators and riders, and in order to operate more economically and to successfully

compete with their competitors between Chicago and Denver, all of which was alleged to be impossible under present conditions, the defendant by condemnation proceedings under Iowa law and through the medium of a sheriff's jury, has taken the land and severed the farm as before stated.

6. That prior to the taking of said right-of-way, their farm was a one-man stock and grain farm located on all-weather road, had excellent school facilities and was a highly desirable farm on which to live, being equipped with all modern conveniences.

7. That by reason of the taking of said right-of-way, the plaintiffs have sustained damages in the sum of $32,000.00.

8. That the plaintiff Archie C. Stude and the plaintiff William Lumpkin are operating said farm as a joint venture, and are doing so both as to livestock operation and to grain raising operations.

9. That plaintiffs allege that they are not able at this time to enumerate all of the items that go to make up the damages to the farm as a whole sustained by said condemnation but allege that among such are included the following items which are elements of damage reducing the value of the farm.

a. The taking by the defendant of 24.47 acres of the best land.

b. Making the farm absolutely unsalable to a large number of potential buyers by reason of the construction through the farm of a high-speed line and destroying all value as a home.

c. Requiring the taking out of production of a strip not less than one rod wide on each side of the right-of-way, containing at least four acres and increasing the labor and expense of cutting weeds along additional fences along the right-of-way.

d. Destroying plaintiff's source of water supply and making it necessary for him to supply water for livestock and other farm purposes upon the parcel of land south of said right-of-way.

e. Making the farm usable only as two separate units, one of which has no buildings. The farm buildings now being located on the tract of land one mile long and 500 feet wide north of the right-of-way and the remainder of the farm of the same size and shape is severed from said buildings.

f. Limiting and making difficult the free movement about the farm of portable buildings and machinery.

g. Rendering the farm a very undesirable place to live by reason of the noise, vibration, soot, dirt and danger to children and also by increasing the hazards of fire. That the vibration will greatly impair the use of electrical instruments and the signals of the locomotive at all hours disturb the sleep of all occupants.

h. Place on the farm a constant and perpetual source of danger to everyone having occasion to go from the land on one side to the other and by limiting to careful and alert adults those who can be entrusted to drive livestock and haul portable buildings and machinery from one part to the other.

i. Increasing the danger and probability of importation to the farm of noxious weeds and plant and animal diseases.

j. Interference with drainage of the farm and making contouring impossible because of the shape of the parcels remaining, creating ditches by diverting surface water into culverts instead of sheet run-off thus encouraging erosion.

k. Greatly increasing the cost and labor of operation.

l. Necessitating the very dangerous crossing of the railroad line many times each day in normal operations.

m. Decreasing the desirability of the farm to good tenants and operators and making it difficult to obtain and retain such.

n. Decreasing the rental and sale value of the farm.

o. Destroying the suitability as use for a stock and grain farm.

p. By necessitating the travel between the land on each

side to be over one way or roadway, thus increasing erosion and rendering such way unusable for crop purposes.

8. Plaintiff Archie C. Stude requests a jury trial to assess his damages.

COUNT TWO.

1. Plaintiff William Lumpkin is the tenant and son-in-law of Archie C. Stude. That he is the operator as a joint venture with Archie C. Stude of the farm described as the north one-fourth of Section 20, Township 76 north, Range 40 west in Pottawattamie County, Iowa, containing 160 acres.

2. That the defendant instituted proceedings in eminent domain before the Sheriff of Pottawattamie County, to acquire ownership and possession of a right-of-way through said real estate, the exact description of which is set out in its removal petition. That the Sheriff's commission filed its report on February 12, 1952, and allowed this plaintiff the sum of $1000.00 as damages, and the defendant has caused documents to be served upon this plaintiff indicating its intention to appeal said award to this Court and also to the District Court of Pottawattamie County, Iowa.

3. That the plaintiff William Lumpkin, at the time of the condemnation proceedings, was a tenant upon the real estate described before. That he was operating said farm as a joint venture with the plaintiff Archie C. Stude.

4. That for the alleged purposes of shortening their line between Atlantic and Council Bluffs, Iowa, and of eliminating curves and grades, and to permit operation of trains at speed of ninety or more miles per hour with greater safety to the operators and riders, and in order to operate more economically and to successfully compete with their competitors between Chicago and Denver, all of which was alleged to be impossible under present conditions, the defendant by condemnation proceedings under Iowa law and through the medium of a sheriff's jury, has taken 24.47 acres of land for railway purposes through said farm.

5. That the plaintiff William Lumpkin lost the use of 24.47 acres of said farm from the time of said taking and he further sustains damages by reason of the taking of said right-of-way as follows:

a. Limiting and making difficult the free movement about the farm of portable buildings and machinery.

b. Rendering the farm a very undesirable place to live by reason of noise, vibration, soot, dirt and danger to children and also by increasing the hazards of fire. That the vibration will greatly impair the use of electrical instruments and the signals of the locomotive at all hours disturb the sleep of occupants.

c. Place on the farm a constant and perpetual source of danger to everyone having occasion to go from the land on one side to the other and by limiting to careful and alert adults those who can be entrusted to drive livestock and haul portable buildings and machinery from one part to the other.

d. Increasing the danger and probability of importation to the farm of noxious weeds and of plant and animal diseases.

e. Greatly increasing the cost and labor of operation.

f. Necessitating the very dangerous crossing of the railroad line many times each day in normal operations.

g. Destroying the suitability as use for a stock and grain farm.

h. By necessitating the travel between the land on each side to be over one way or roadway, thus increasing erosion and rendering such way unusable for crop purposes.

6. That by reason of the taking of said right-of-way, plaintiff William Lumpkin has been damaged in the sum of $2500.00.

7. Plaintiff William Lumpkin requests a jury trial to assess his damages.

Wherefore, plaintiffs pray that plaintiff Archie C. Stude be allowed the sum of $32,000.00 by reason of his damage as set out in Count One; that plaintiff William Lumpkin be allowed damages in the sum of $2500.00 by reason of

his damage as set out in Count Two. Plaintiffs further pray that each be allowed interest on the amount awarded at 5% from February 16, 1952, and costs of this action including attorneys' fees for their attorneys.

Thereafter an order was entered by the Court assigning the Motion to Remand for hearing at Des Moines, Iowa, at the same time fixed for the hearing on the Motion to Dismiss as set forth herein at page 17 of this Record.

Thereafter on July 19, 1952, the Court filed the Memorandum Opinion and Order hereinbefore set forth at pages 18-37 of this Record.

On July 23, 1952, the court filed an order overruling the Motion to Remand as hereinbefore set forth at pages 37-39 of this Record.

On July 23, 1952, Archie C. Stude filed in the office of the Clerk of the United States District Court the following

MOTION FOR REHEARING

Plaintiff herein moves the court for an order granting leave to re-argue the motion to remand in the above entitled action, for the following reason:

1. On page 11 in Division II of the Memorandum Opinion filed by the court herein on July 19, 1952, the court states that "the authority of the Boynton case is fully recognized and accepted." On page 12 thereof, the court in referring to the facts in the instant cases states "Therefore, the land is 'lost' to the owner and the situation of the parties is completely changed from that which existed in the Boynton case." Plaintiff submits that the facts in the Boynton case were similar to those present herein and that the amount of the awards had been deposited in

the Boynton case before appeals were taken, which fact appears in the statement of facts in the opinion as follows:

> "On the same day the railroad company paid the sheriff that amount of money for the use of the owner."

and in the body of the opinion itself, as follows:

> "Even if, as in this case, it deposits the amount first assessed with the sheriff, the latter is not to pay it over until the determination of the appeal. § 2010. We see no reason to suppose that the deposit impairs the railroad's right to withdraw, although the supreme court of Iowa says ubi supra, that, by payment and entry, the railroad appropriates the land. See § 2013."

Plaintiff further submits that under the finding of the court herein the Boynton case is controlling and the court is bound by the decision in the Boynton case. Plaintiff further submits that leave should be granted to re-argue said motion to point out the similarity of the factual situations because plaintiff believes that such would have a controlling effect herein.

Wherefore plaintiff prays that leave of court be granted plaintiff to re-argue the motion to remand in the above entitled action.

By order of court the Motion for Rehearing was orally argued on August 19, 1952, and on September 17, 1952, the court entered the following

ORDER OVERRULING MOTION FOR REHEARING

The above entitled causes came on for hearing before the court at Council Bluffs, Ia., on August 19, 1952, upon the motions of the several named plaintiffs herein for a rehearing of the ruling of the court made in its opinion of July 19, 1952, and its order thereon of July 23, 1952, denying their motions to remand the said actions to the District Court of Iowa in and for Pottawattamie County, from which they were removed by the defendant, Chicago, Rock Island & Pacific R. R. Company. Raymond A. Smith,

John Leroy Peterson, Phillip J. Willson of Council Bluffs, Ia., and G. C. Wyland of Avoca, Ia., appeared for the movants plaintiffs in cases numbered 1-91, 1-95, 1-96, 1-97, 1-100 and 1-101; John M. Peters of Council Bluffs, Ia., appeared for the movants in cases numbered 1-92 and 1-99; and Daniel J. Gross and Harold W. Kauffman of Omaha, Nebr., appeared for the movants in cases numbered 1-93 and 1-98. The said motions were argued both orally and by written briefs and upon consideration of the same, the court is satisfied that the ruling aforesaid should be affirmed.

It is therefore Ordered that the motions of the plaintiffs herein for a rehearing of the ruling made by the court in its opinion of July 19, 1952, and its order thereon of July 23, 1952, be and the same are hereby overruled and the said ruling and order of the court are hereby affirmed.

Signed at Des Moines, Ia., this 17th day of September, 1952.

s/ Wm. F. Riley,
United States District Judge.

On August 22, 1952, Archie C. Stude filed in the office of the Clerk of the United States District Court the following:

United States District Court, Southern District of Iowa, Western Division

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Plaintiff*, vs. WALTER KAY, ET AL., *Defendants*. (And other cases as here numbered)	Civil Nos. 1-80 to 1-83 inclusive, Civil Nos. 1-85 to 1-90 inclusive.

ALVA F. CARBUHN, ET AL., *Plaintiff*, vs. CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, ET AL., *Defendants.* (And other cases as here numbered)	Civil Nos. 1-91 to 1-93 inclusive, Civil Nos. 1-95 to 1-101, inclusive. NOTICE OF CROSS-APPEAL AND APPEAL To be filed in 1-101

Notice is hereby given that Archie C. Stude, designated as defendant in Civil No. 1-91 and designated as Plaintiff in Civil No. 1-101, hereby cross-appeals and appeals to the United States Court of Appeals for the Eighth Circuit from that portion of the consolidated Order entered in the above entitled and numbered actions of July 23, 1952, overruling the Motion to Remand.

On October 14, 1952, Archie C. Stude filed in the office of the Clerk of the United States District Court a

NOTICE OF CROSS-APPEAL AND APPEAL

identical in form with the notices set forth at pages 40, 41 and 57, 58, of this Record, except that said notice included the ruling of the court on the Motion for Rehearing entered on September 17, 1952.

On October 14, 1952, Archie C. Stude filed in the office of the Clerk of the United States District Court a

BOND FOR COSTS ON APPEAL

in the form and manner prescribed by law, which bond was approved by the clerk. Copies of the Notices of Appeal were mailed to counsel for Chicago, Rock Island and Pacific Railroad Company.

On September 25, 1952, an order was entered by the Court extending the time for docketing the appeals and cross-appeals in the office of the Clerk of the United

States Court of Appeals for a period of seventy days from and after the filing of the notice of appeal.

On October 13, 1952, there was filed and entered in said cause a

STIPULATION AND ORDER

as set forth at pages 41-45 of this Record.

DOCKET ENTRIES

No. 1-81 Civil Action

1952

Mar. 7 Filed Complaint.

Mar. 24 Filed Motion to Dismiss.

Mar. 24 Filed Answer and Counterclaim of defendants Stude and Lumpkin and Request for Jury Trial.

Mar. 26 Filed Certificate of Service.

June 14 Filed Affidavit of Philip J. Willson.

July 19 Filed Memorandum Opinion and Order. Riley, J., OJ1-498-516, incl. Notice to Counsel 7-19-52.

July 23 Filed Order sustaining Motion to Dismiss and Order of Dismissal. Riley, J.

July 24 Entered Order sustaining Motion to Dismiss and Order of Dismissal. Riley, J. OJ1-521-525, incl. Notice to Attys. 7-24-52.

Aug. 18 Filed Notice of Appeal of Chicago, Rock Island and Pacific Railroad Company. Copies mailed to Raymond A. Smith, John L. Peterson and Philip J. Willson, Co. Bluffs, Iowa, G. C. Wyland, Avoca, Iowa, Attys. for Defendants and to Auditor Pottawattamie County, Co. Bluffs, Iowa.

Aug. 22 Filed Notice of Cross-Appeal and Appeal. Copy mailed to R. L. Read, A. B. Howland and B. A. Webster, Jr., Des Moines, Iowa, Attys.

for C. R. I. & P. R. R. Co., and to Auditor of Pottawattamie County, Council Bluffs, Iowa.

Aug. 26 Filed Bond on Appeal—U. S. Guarantee Co. $250.00.

Sep. 25 Filed Stipulation for Extension of Time for Filing the Record on Appeal and Docketing the Appeals.

Sep. 25 Filed Order for Extension of Time for Filing Record on Appeal and Docketing Appeals. Riley, J. OJ1-573 to 576, incl. Notice to counsel 9/26/52.

Oct. 13 Filed Stipulation for correction of record.

Oct. 13 Filed Order for correction of Record, Riley, J., OJ1-592 to 596, incl. Notice to counsel 10/15/52.

Oct. 13 Filed Stipulation for Consolidation of Record.

Oct. 13 Filed Order for Consolidation of Record. Riley, J., OJ1-596 to 605, incl. Notice to counsel 10/15/52.

Oct. 13 Filed Bond for Costs on Appeal. ($250.00—United States Fidelity and Guaranty Company.)

DOCKET ENTRIES

No. 1-101 Civil Action

1952

Mar. 12 Filed Petition for Removal to the United States District Court for the Southern District of Iowa, Western Division.

Mar. 12 Filed Removal Bond—$1000 U. S. Guarantee Co.

Mar. 24 Filed Motion to Remand.

Mar. 24 Filed Petition with Request for Jury Trial.

Mar. 26 Filed Certificate of Service.

Mar. 27 Filed Appearance Attorneys for C. R. I. & P. R. R. Co.

Mar. 28 Filed Copy of Notice of Appeal with return of Sheriff of Pottawattamie County, Iowa.

Apr. 7 Filed Transcript on Appeal.

July 19 Filed Memorandum Opinion and Order. Riley, J., OJ1-498 to 516, incl. Notice to Counsel 7-19-52.

July 23 Filed Motion for Rehearing.

July 23 Filed Order overruling Motion to Remand. Riley, J.

July 25 Entered Order overruling Motion to Remand. Riley, J., OJ1-521 to 525, incl. Notice to Attys. 7-24-52.

Aug. 22 Filed Notice of Cross-Appeal and Appeal. Copy mailed to R. L. Read, A. B. Howland and B. A. Webster, Jr., Des Moines, Iowa, attys. for C. R. I. & P. R. R. Co., and to Auditor Pottawattamie County, Iowa, Council Bluffs, Iowa.

Sep. 17 Filed Order overruling Motion for Rehearing. Riley, J., Ent. OJ1-559 to 562, incl. Notice to counsel 9-17-52.

Sep. 25 Filed Stipulation for Extension of Time for Filing the Record on Appeal and Docketing the Appeals.

Sep. 25 Filed Order for Extension of Time for Filing Record on Appeal and Docketing Appeals. Riley, J., OJ1-573 to 576, incl. Notice to counsel 9-26-52.

Oct. 13 Filed Stipulation for correction of record.

Oct. 13 Filed Order for correction of record. Riley, J., OJ1-592 to 596, incl. Notice to counsel 10-15-52.

Oct. 13 Filed Stipulation for Consolidation of Record.

Oct. 13 Filed Order for Consolidation of Record. Riley, J., OJ1-596 to 605, incl. Notice to counsel 10-15-52.

Oct. 14 Filed Notice of Cross-Appeal and Appeal. Copy mailed to R. L. Read, A. B. Howland and

B. A. Webster, Jr., Des Moines, Iowa, Attys. for C. R. I. & P. R. R. Co.

Oct. 14 Filed Bond for Costs on Appeal. ($250.00—United States Fidelity and Guaranty Company.)

[fol. 63] And thereafter the following proceedings were had in said causes in the United States Court of Appeals for the Eighth Circuit, viz.:

(Appearance of Mr. R. L. Read, Mr. A. B. Howland, Mr. Oscar Johnson and Mr. Robert M. Stuart for Appellant in Cause No. 14,724.)

United States Court of Appeals
for the Eighth Circuit.

Chicago, Rock Island and Pacific Railroad Company,
Appellant,
No. 14,724. vs.
Archie C. Stude, et al.

The Clerk will enter my appearance as Counsel for the Appellant.

R. L. READ,

A. B. HOWLAND,
500 Bankers Trust Bldg.,
Des Moines, Iowa.

OSCAR JOHNSON,

ROBERT M. STUART,
Park Bldg.,
Council Bluffs, Iowa.

(Endorsed): Filed in U. S. Court of Appeals, Oct. 23, 1952.

[fol. 64] (Appearance of Mr. B. A. Webster, Jr., as Counsel for Appellant in Cause No. 14,724.)

The Clerk will enter my appearance as Counsel for the Appellant.

B. A. WEBSTER, JR.

(Endorsed): Filed in U. S. Court of Appeals, Mar. 6, 1953.

(Appearance of Mr. Raymond A. Smith, Mr. John LeRoy Peterson and Mr. Philip J. Willson as Counsel for Appellees in Cause No. 14,724.)

The Clerk will enter my appearance as Counsel for the Appellees.

RAYMOND A. SMITH,
JOHN LeROY PETERSON,
PHILIP J. WILLSON.

(Endorsed): Filed in U. S. Court of Appeals, Oct. 31, 1952.

(Appearance of Mr. John M. Peters as Counsel for Appellees in Cause No. 14,724.)

The Clerk will enter my appearance as Counsel for the Appellees.

JOHN M. PETERS.

(Endorsed): Filed in U. S. Court of Appeals, Mar. 6, 1953.

[fol. 65] (Appearance of Mr. Raymond A. Smith, Mr. John LeRoy Peterson and Mr. Philip J. Willson as Counsel for Appellant in Cause No. 14,725.)

United States Court of Appeals
for the Eighth Circuit.

Archie C. Stude, Appellant,
No. 14,725. vs.
Chicago, Rock Island and Pacific Railroad Company.

The Clerk will enter my appearance as Counsel for the Appellant.

RAYMOND A. SMITH,
JOHN LeROY PETERSON,
PHILJP J. WILLSON.

(Endorsed): Filed in U. S. Court of Appeals, Oct. 31, 1952.

(Appearance of Mr. John M. Peters as Counsel for Appellant in Cause No. 14,725.)

The Clerk will enter my appearance as Counsel for the Appellant.

JOHN M. PETERS.

(Endorsed): Filed in U. S. Court of Appeals, Mar. 6, 1953.

[fol. 66] (Appearance of Counsel for Appellee in Cause No. 14,725.)

The Clerk will enter my appearance as Counsel for the Appellee.

R. L. READ,

A. B. HOWLAND,

B. A. WEBSTER, JR.

(Endorsed): Filed in U. S. Court of Appeals, Mar. 6, 1953.

(Appearance of Mr. Raymond A. Smith, Mr. John LeRoy Peterson and Mr. Philip J. Willson as Counsel for Appellants in Cause No. 14,726.)

United States Court of Appeals
for the Eighth Circuit.

Archie C. Stude and William Lumpkin, Appellants,
No. 14,726. vs.
Chicago, Rock Island and Pacific Railroad Company.

The Clerk will enter my appearance as Counsel for the Appellants.

RAYMOND A. SMITH,

JOHN LeRoy PETERSON,

PHILIP J. WILLSON.

(Endorsed): Filed in U. S. Court of Appeals, Oct. 31, 1952.

[fol. 67] (Appearance of Mr. John M. Peters as Counsel for Appellants in Cause No. 14,726.)

The Clerk will enter my appearance as Counsel for the Appellants.

JOHN M. PETERS.

(Endorsed): Filed in U. S. Court of Appeals, Mar. 6, 1953.

(Appearance of Counsel for Appellee in Cause No. 14,726.)

The Clerk will enter my appearance as Counsel for the Appellee.

R. L. READ,

A. B. HOWLAND,

B. A. WEBSTER, JR.

(Endorsed): Filed in U. S. Court of Appeals, Mar. 6, 1953.

[fol. 68] At the request of the attorneys for Chicago, Rock Island and Pacific Railroad Company there is included herein the Points To Be Argued, with citations of authorities, from the briefs of the parties filed in the three causes, as follows:

a. From the Brief for Appellant in No. 14,724.

Propositions Of Law Relied Upon And Citations.

I.

Upon the service of the notice of appeal to the District Court of the United States, the controversy became a civil action within the meaning of Sec. 1332, U. S. C. A., inasmuch as the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and the controversy is between citizens of different states.

Sec. 1332, U. S. C. A.;

Myers v. Chicago & Northwestern Ry. Co., 118 Iowa 312;

Mississippi & Rum River Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206;

Madisonville Traction Co. v. St. Bernard Mining Co., 196 U. S. 239, 49 L. Ed. 462;

Union Pacific R. R. Co. Removal Cases, 115 U. S. 1, 29 L. Ed. 319;

Mason City & Ft. Dodge R. R. Co. v. Boynton, 204 U. S. 570, 51 L. Ed. 629.

II.

The United States District Court has original jurisdiction over "civil actions," the prescribed jurisdictional requisites being present. After the administrative procedure in connection with condemnation proceedings under the laws [fol. 69] of the State of Iowa has been completed, and the controversy remaining involves only the amount of damages, the appeal to the courts permitted by the Iowa statute may be brought as an original suit in the Federal Court when the prescribed jurisdiction requisites exist.

Texas Pipe Line Co. v. Ware, 15 F. (2d) 171 (C. A. 8th);

Ellis v. Associated Industries Ins. Corp., 24 F.(2d) 809 (C. A. 5th);

Flowers v. Aetna Casualty & Surety Co., 154 F. (2d) 881 (C. A. 6th);

Northern Pacific R. R. Co. v. Babcock, 154 U. S. 190, 38 L. Ed. 958;

United States v. 16,572 Acres of Land, et al., 49 F. Supp. 555.

III.

The Iowa statutes authorizing appeals from an assessment by the sheriff's commissioners (Sec. 472.18, Code of Iowa, 1950) to the "district court" does not purport to exclude a direct appeal to the United States District Court. To hold otherwise would result in denying the jurisdiction of the Federal Courts in civil actions where the jurisdictional requisites, as provided by Sec. 1332, U. S. C. A., exist, and to assume a power not possessed by the Iowa Legislature.

Blacker v. Thatcher, 145 Fed. (2) 255, cert. denied 89 L. Ed. 1409;

Guilfoil v. Hayes, 86 Fed. (2) 544, cert. denied 81 L. Ed. 876.

b. From the Brief of Appellees, No. 14,724, Cross-Appellant, No. 14,725, Appellants, No. 14,726.

Points To Be Argued And Citations.

Point I.

[fol. 70] Where the jurisdiction of a Federal Court is directly attached in a particular case, the presumption is against jurisdiction until the contrary affirmatively appears.

Young v. Main, 8 Cir., 72 F. 2d 640

Ward v. Morrow, 8 Cir., 15 F. 2d 660

McNutt v. McHenry Chevrolet Co., 298 U. S. 178, 80 L. Ed. 1135, 56 S. Ct. 780.

Norton v. Larney, 266 U. S. 511, 69 L. Ed. 413, 45 S. Ct. 145.

Point II.

A railroad desiring to condemn land pursuant to the substantive law of a state, including Iowa, may proceed either in the State Court or in the Federal Court. If it proceeds under the state law, it must follow the state procedure, and if it proceeds in Federal Court, it must follow Rule 71A of the Federal Rules of Civil Procedure.

Franzen v. Chicago, Milwaukee & St. Paul Railway Co., 7 Cir., 278 F. 370.

Mississippi, etc., River Room Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206.

Searl v. School District, 124 U. S., 197, 41 L. Ed. 415, 8 S. Ct. 460.

Madisonville Traction Company v. St. Bernard Mining Company, 196 U. S. 239, 49 L. Ed. 462, 25 S. Ct. 251.

Mason City & Fort Dodge Railway Company v. Boynton, 204 U. S. 570, 51 L. Ed. 629, 27 S. Ct. 321.

Kohl v. United States, 91 U. S. 367, 23 L. Ed. 449.

Code, Iowa, 1950, Chapter 471.

Code, Iowa, 1950, Secs. 471.6, 471.9, 471.10.

Code, Iowa, 1950, Chapter 472.

Code, Iowa, 1950, Secs. 472.3, 472.4, 472.8-472.13, 472.14, 472.17, 472.18, 472.21, 472.22, 472.25.

Federal Rules of Civil Procedure, Rule 71A, 28 U. S. C. A.

[fol. 71] Point III.

There can be no direct appeal to the United States District Court from an award of commissioners appointed by a County Sheriff to appraise damages in a condemnation proceeding instituted under a state condemnation procedural statute and a purported appeal from such an award to the United States District Court is ineffective and confers no jurisdiction in the court.

Franzen v. Chicago, Milwaukee & St. Paul Railway Co., 7 Cir., 278 Fed. 370.

Williams Livestock Company v. Delaware L. & W. R. Co., D. C. Pa., 285 Fed. 795.

United States v. 16,572 acres of land, D. C., S. D. Texas, 49 Fed. Supp. 555.

California Prune & Apricot Growers Assn. v. Catz American Co., 9 Cir., 60 F. 2d 788.

United States v. 40,558 acres of land in Newcastle County, Delaware, 62 Fed. Supp. 98.

United States v. 18,236 acres of land in Franklin, Pennsylvania, 63 Fed. Supp. 665.

United States v. 1010.8 acres of land in Sussex County, Delaware, 77 Fed. Supp. 529.

United States v. 17,280 acres of land, more or less, situated in Saunders County, Nebraska, 47 Fed. Supp. 267.

United States v. 250 acres of land in Nueces County, Texas, 43 Fed. Supp. 937.

United States v. 266.25 acres of land in Charleston County, South Carolina, 43 Fed. Supp. 633.

United States v. Federal Land Bank of St. Paul, 8th Cir., 127 Fed. 2d 505.

Chicago, Rock Island & Pac. Railway Co. v. Kay, 107 F. Supp. 895.

[fol. 72] The Sloop Merchant D. C. New York, Abb. Adm. 1, 17 Fed. Cas. No. 9, 434.

Gibbons v. Ogden, 9 Wheat, 1, 6 L. Ed. 23.

Sibbach v. Wilson & Co., 212 U. S. 1, 85 L. Ed. 479, 61 S. Ct. 422.

Kellman v. Stoltz, D. C. Iowa, 1 F. R. D. 726.

Austin 1. Riley, 55 Fed. 833.

Federal Rules of Civil Procedure, Rule 71A, 28 U. S. C. A.

Notes of Advisory Committee on Rules, 28 U. S. C. A. following Rule 71A.

Point IV.

The Railroad failed to follow any of the procedural requirements of Rule 71A; therefore the District Court has no jurisdiction of the person or subject matter herein; and since the State Court first assumed jurisdiction of the res and subject matter herein, said State Court has exclusive jurisdiction.

United States v. Bank of New York & Trust Company, 296 U. S. 463, 56 S. Ct. 343, 80 L. Ed. 331.

Penn. General Casualty Company v. Commonwealth, 294 U. S. 189, 55 S. Ct. 386, 79 L. Ed. 850.

Franzen v. Chicago, M. & St. P. Ry. Co., 7 Cir., 278 Fed. 370.

Senior v. Pierce (C. C., S. D.-Ia., 1887) 31 Fed. 625.

Havner v. Hegnes (C. C. A. 8th, 1920), 269 Fed. 537.

American Automobile Insurance Company v. Freundt, 7 Cir., 103 F. 2d 613.

Federal Rules of Civil Procedure, Rule 71A, 28 U. S. C. A.

Point V.

The Railroad, having initiated state proceedings before the Sheriff and having proceeded with them to the point of [fol. 73] obtaining the land and proceeding with the construction, is bound by its election of forum and has waived any right to proceed in Federal Court.

Vanderwater v. City Natl. Bank of Kankakee, Ill., 28 F. Supp. 89.

Rock Island Motor Transit Co. v. Murphy Motor Freight Lines, Inc., 101 F. Supp. 978.

Yellow Cab Company v. Price, D. C., Ill., 50 F. Supp. 730.

Kane v. National Surety Corporation, D. C. Tex., 94 Fed. Supp. 605.

Hyatt v. Challiss, 55 Fed. 267.

Michigan Railroad Commission v. Detroit, etc., R. Co., 182 Mich. 234, 148 N. W. 385.

Franzen v. Chicago, Milwaukee & St. Paul Railway Co., 7 Cir., 278 Fed. 370.

21 C. J. S. Courts, Sec. 527, page 807.

Code, Iowa, 1950, Secs. 471.6, 471.9, 471.10.

Code, Iowa, 1950, Chap. 472.

Federal Rules of Civil Procedure, Rule 71A, 28 U. S. C. A.

Points To Be Argued And Citations.

Point I.

Where a case is properly before the United States Court of Appeals for review of an appealable order, any and all other orders determining the jurisdiction of the federal court may and will be reviewed.

Deckert v. Independence Shares Corp., 311 U. S. 282, 85 L. Ed. 199, 61 S. Ct. 229.

Mayflower Industries v. Thor Corp., et al., 3 Cir., 1950, 184 F. 2d 537.

Goldwyn Pictures Corp. v. Howells Sales Co., 2 Cir., 1923, 287 F. 100.

Johnson v. Butler Bros., 8 Cir., 1947, 162 F. 2d 87.

[fol. 74] Cray, McFawn & Co. v. Hegarty, Conroy & Co., 2 Cir., 1936, 85 F. 2d 516.

Schell v. Food Machinery Corp. 5 Cir., 1937, 87 F. 2d 385.

Smith v. Vulcan Iron Works, 165 U. S. 518, 41 L. Ed. 165, 17 S. Ct. 407, 410.

Willoughby v. Sinclair Oil & Gas Co., 10 Cir., 1951, 188 F. 2d 903.

Peters v. Standard Oil Co. of Tex., 5 Cir., 174 F. 2d 162.

State of Maryland v. Soper, 270 U. S. 9, 70 L. Ed. 449, 46 S. Ct. 185.

Point II.

A condemnor railroad appealing to a state district court from an award of commissioners, under a state procedural statute is not a "defendant" within the Federal Removal Statute, 28 U. S. C. A., Sec. 1441.

Mason City v. Fort Dodge Railroad Company v. Boynton, 1907, 204 U. S. 570, 51 L. Ed. 629, 27 S. Ct. 321.

Shamrock Oil & Gas Corporation v. Sheets, 313 U. S. 100, 85 L. Ed. 1214, 61 S. Ct. 868.

State of Minnesota v. Chicago M. St. P. & P. R. R. Co. (D. C. Minn. 4th Div. 1931), 50 F. 2d 430.

Rock Island Motor Transit Co. v. Murphy Motor Freight Lines (D. C. Minn., 1952), 101 F. Supp. 978.

Hagerla v. Mississippi River Power Co., D. C. Ia., 202 Fed. 771.

Kloeb v. Armour & Company, 311 U. S. 199, 85 L. Ed. 124, 61 S. Ct. 213.

Merchants Food Distributors v. Clinton Foods, 92 Fed. Supp. 941.

Breyman v. Pennsylvania, O. & D. R. Company, 6 Cir., 38 F. 2d 209.

Shawnee Nat. Bank v. Missouri, K. & T. Ry. Co. (C. C. Okla.), 175 F. 456.

Odhner v. Northern Pac. Ry. Co. (C. C. N. Y.), 188 F. 507.

[fol. 75] Western Union Telegraph Co. v. Louisville & N. R. Co. (D. C. Tenn.), 201 F. 932.

Key v. West Kentucky Coal Co. (D. C. Ky.), 237 F. 258.

Cudney v. Midcontinent Airlines, Inc., 98 F. Supp. 403.

Code, Iowa, 1950, Secs. 472.14, 472.18, 472.20, 472.21.

28 U. S. C. A., Sec. 1441 (a).

c. From the Reply Brief of Appellant in No. 14,724, Appellee in No. 14,725 and Appellee in No. 14,726.

Points To Be Argued In Reply And Citations.

I.

(Refers to Points II and V of Appellee's Brief.)

A. U. S. District Courts have original jurisdiction only in "civil actions" where the matter in controversy exceed the sum or value of $3,000, exclusive of interest and costs and is between citizens of different states.

U. S. Code Ann., Tit. 28, Sec. 1332.

B. A condemnation proceeding in the nature of an inquest or preliminary appraisement of damages conducted by administrative officers of a state is not a civil action within the meaning of Sec. 1332, U. S. Code Ann.

Kaw Valley Drainage District v. Metropolitan Water Co., 196 Fed. 315 (C. A. 8th);

Des Moines Water Co. v. City of Des Moines, 206 Fed. 657 (C. A. 8th);

Mississippi and Rum River Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206;

[fol. 76] Searl v. School District, 124 U. S. 197, 31 L. Ed. 415.

C. Rule 71A, Federal Rules of Civil Procedure, is a rule regulating procedure in cases properly within the jurisdiction of district courts. The rule neither grants jurisdiction nor enlarges the pre-existing jurisdiction of the district courts.

II.

(Refers to Point III of Appellee's Brief.)

The procedure followed by appellant was in substantial compliance with the requirements of Rule 71A, and the U. S. District Court had jurisdiction both over the parties and the subject matter of the action.

A. Rule 71A expressly requires that state law be followed when the law of the state requires trial of the issue of compensation by commission.

III.

A state may not by its laws create rights, provide for their acquisition and determination in a judicial proceeding and restrict the right of non-residents to resort to federal tribunals. The provisions of Section 472.18, Iowa Code 1950, do not deprive appellant here of its federal right to resort to the courts of the United States for the determination of the amount of compensation to which the landowners may be entitled for the taking of their lands.

Point To Be Argued And Citations.

I.

A condemnor of lands for railroad purposes is both a [fol. 77] nominal and actual defendant upon an appeal to the Iowa District Court from the award of damages made by Sheriff's commissioners.

Sec. 472.21, Iowa Code 1950;

Mason City & Ft. Dodge R. R. Co. v. Boynton, 204 U. S. 570, 51 L. Ed. 629.

Kirby v. Chicago & N. W. Ry. Co., 106 Fed. 551;

Hagerla v. Mississippi River Power Co., 202 Fed. 771;

Myers v. Chicago & N. W. Ry. Co., 118 Iowa 312, 91 N. W. 1076.

[fol. 78] (Order of Submission in Causes Nos. 14,724, 14,725 and 14,726.)

United States Court of Appeals
for the Eighth Circuit.

September Term, 1952.

Friday, March 6, 1953.

Chicago, Rock Island and Pacific Railroad Company,
Appellant,
No. 14,724. vs.
Archie C. Stude, et al.

Appeal from the United States District Court
for the Southern District of Iowa.

Archie C. Stude, Cross-Appellant,
No. 14,725. vs.
Chicago, Rock Island and Pacific Railroad Company.

Appeal from the United States District Court
for the Southern District of Iowa.

and

Archie C. Stude, et al., Appellants,
No. 14,726. vs.
Chicago, Rock Island and Pacific Railroad Company.

Appeal from the United States District Court
for the Southern District of Iowa.

These causes Nos. 14,724, 14,725 and 14,726, having been called for hearing in their regular order, are argued together, and argument was commenced by Mr. A. B. Howland for the Chicago, Rock Island and Pacific Railroad Company, continued by Mr. Raymond A. Smith and Mr. Harold W. Kauffman for Archie C. Stude, et al., and concluded by Mr. A. B. Howland for the Chicago, Rock Island and Pacific Railroad Company.

Thereupon, these causes were submitted to the Court on the printed record and briefs of counsel filed herein.

[fol. 79] (Opinion in Causes Nos. 14,724, 14,725 and 14,726.)

United States Court of Appeals
For The Eighth Circuit.

No. 14,724.

Chicago, Rock Island and Pacific Railroad Company,
Appellant,
vs.
Archie C. Stude, William Lumpkin and Pottawattamie County, Iowa,
Appellees.

Appeal from the United States District Court for the Southern District of Iowa.

No. 14,725.

Archie C. Stude,
Cross-Appellant,
vs.
Chicago, Rock Island and Pacific Railroad Company,
Cross-Appellee.

Appeal from the United States District Court for the Southern District of Iowa.

No. 14,726.

Archie C. Stude and William Lumpkin,
Appellants,
vs.
Chicago, Rock Island and Pacific Railroad Company,
Appellee.

Appeal from the United States District Court for the Southern District of Iowa.

[April 30, 1953.]

A. B. Howland (R. L. Read and B. A. Webster, Jr., were with him on the brief) for Chicago, Rock Island and Pacific Railroad Company.

Raymond A. Smith and Harold W. Kauffman (Philip J. Willson, John M. Peters, G. C. Wyland, Daniel J. Gross, and Dorothy O'D Martin were with them on the brief) for Archie C. Stude, et al.

Before GARDNER, Chief Judge, and THOMAS and COLLET, Circuit Judges.

COLLET, Circuit Judge.

This action involves the right of the Rock Island Railroad Company to have the issue of damages for the taking of private property by eminent domain under state law determined in the federal courts.

The actions, ten in number,[1] were initiated by the Rock Island by filing with the sheriff of Pottawattamie County, Iowa, a written application conforming to the Iowa Code of practice in eminent domain proceedings by railroad companies. Authority had theretofore been obtained from the Interstate Commerce Commission and the state authorities of Iowa to relocate a short section of the Rock Island's line in the interest of better alignment and reduction of mileage. The Iowa Code fixes the following procedure. An application is filed with the sheriff of the county, requesting that he appoint a commission to assess the damages. The commissioners make their report fixing the damages and the condemning party takes possession of the property upon paying the amount of the commissioners' award to the sheriff for the use of the property owner. In this case the

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[1]Ten tracts were involved. Separate proceedings were filed as to each. By stipulation all parties agreed that an appeal would be taken in the proceeding relating to one only and the remainder should abide the result in this one.

amount of the commissioners' awards was paid, the Rock Island took possession, and the sheriff holds the funds subject to orders. The assessment made by the commissioners becomes final if not appealed from within a period fixed by the statute. Either party may appeal. An appeal is taken by giving notice to the sheriff and the interested parties, the appeal is lodged in the district court of the state for the appropriate county in which the land is situated, and docketed in that court. The Iowa Code provides that appeals shall be docketed in the name of the owner of the land, or the name of such other appealing party interested in the land, as plaintiff, and in the name of the applicant for condemnation as defendant, and thereafter tried "as in an action by ordinary proceedings." After the appeal is docketed the Code provides that:

"472.22. Pleadings on appeal. A written petition shall be filed by the plaintiff on or before the first day of the term to which appeal is taken, stating specifically the items of damage and the amount thereof. The defendant shall file a written answer to plaintiff's petition, or such other pleadings as may be proper."

The issue of damages is then tried de novo by jury on demand of either party.

The foregoing statutory procedure was strictly followed by the Rock Island up to the point of lodging the appeals with the state district court. The Rock Island paid the amount of the commissioners' award to the sheriff, took possession of the condemned property and began the construction of the railroad on it. But instead of filing appeals only with the state district court it lodged one appeal from each award of the sheriff's commission with that court and another, duplicate in effect, with the United States District Court. The appeals docketed in the state district court were docketed in the names of the landowners as plaintiffs and the Rock Island as defendant as the statute provided. After the appeals were docketed in the state district court,

the property owners filed their "petitions" as plaintiffs, as provided for under the state Code, setting up their claims for damages for the taking of their property. Those claims were substantially in excess of the amount awarded by the commissioners. Those appeals were removed to the United States District Court by the Rock Island. Thus the Rock Island sought to insure the trial of the issue of damages in the United States courts by taking alternate procedural methods of obtaining that result, an expedient not heretofore unknown to federal jurisprudence in other types of actions. The requisite diversity of citizenship and amount involved existed in each case. Motions to remand were filed by the property owners in each of the cases removed from the state district court, on the ground that the Rock Island, being the plaintiff, could not remove. Motions to dismiss the appeals which had been taken by the Rock Island direct from the sheriff's commissioners' awards to the United States District Court were filed by the property owners on the ground that such appeals were unauthorized by either the state Code or by the Federal Rules of Civil Procedure applicable to proceedings in eminent domain. The trial court sustained the motions to dismiss the appeals to the United States District Court taken direct from the award of the commissioners on the ground that at that stage of the condemnation proceedings, under the state Code those proceedings were not "civil actions brought in a state court" within the meaning of the removal statutes, but were in the nature of inquests to ascertain the value of the land, not then pending in any court. The trial court denied the motions to remand on the ground that the Rock Island was, at the time of removal, the defendant within the meaning of the removal statutes. *Chicago, Rock Island & P. R. Co.* v. *Kay, et al*, 107 F. Supp. 895. The Rock Island appealed from the judgment of dismissal. The property owners cross-appealed from the order denying the motion to remand. The appeals were submitted as one case. Under

these circumstances the propriety of the order denying the motion to remand will be reviewed,[2] although such an order, standing alone, is not an appealable order.[3]

The Rock Island contends that it had the right of appeal direct from the commissioners' award filed with the sheriff to the United States District Court before Rule 71A of the Federal Rules of Civil Procedure became effective and that since the effective date of Rule 71A, and particularly Rule 71A (k), the specific procedure for the exercise of that right of appeal is fixed by that rule.[4]

There can be no doubt that when the requisite diversity of citizenship and the amount involved exist, proceedings for the acquisition of private property by eminent domain under state law may be removed from a state court to a federal court. But that right of removal[5] exists only when the proceedings have ripened into a civil action in a state court. In *Boom Co. v. Patterson*, 98 U.S. 403, 406, 25 L. Ed. 206, the Supreme Court said:

"The proceeding in the present case before the commissioners appointed to appraise the land was in the nature of an inquest to ascertain its value, and not a suit at law in

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[2] *Deckert v. Independence Corp.*, 311 U.S. 282; *Schell v. Food Machinery Corp.*, 87 F.2d 986; *Johnson v. Butler Bros.*, 102 F.2d 87; *Cray, McFeeters & Co. v. Hegarty, Conroy & Co.*, 95 F.2d 515; *Mayflower Industries v. Thor Corp.*, 104 F.2d 807. *Dillinger v. Chicago, R. & Q. R. Co.*, 19 F.2d 198, decided by this court to the contrary, was in effect overruled in *Johnson v. Butler Bros.*, 102 F.2d 87, and note should be taken that the former should no longer be followed. *McCabe v. Guaranty Trust Co.*, 343 F. 645, also to the contrary, decided by the Court of Appeals for the Second Circuit, was later overruled by that court in *Cray, McFeeters & Co. v. Hegarty, Conroy & Co.*, 95 F.2d 515.

[3] *Reed v. Lehman*, 91 F.2d 919; *Miller v. Pyrites Co.*, 71 F.2d 894.

[4] "(k) Condemnation Under a State's Power of Eminent Domain. The practice as herein prescribed governs in actions involving the exercise of the power of eminent domain under the law of a state, provided that if the state law makes provision for trial of any issue by jury, or for trial of the issue of compensation by jury or commission or both, that provision shall be followed." Fed. Rules Civ. Proc. Rule 71A, 28 U.S.C.A.

[5] 28 U.S.C.A., Sec. 1441 (a) "* * * any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States * * *."

the ordinary sense of those terms. But when it was transferred to the District Court by appeal from the award of the commissioners, it took, under the statute of the State, the form of a suit at law, and was thenceforth subject to its ordinary rules and incidents. The point in issue was the compensation to be made to the owner of the land; in other words, the value of the property taken. No other question was open to contestation in the District Court. *Turner* v. *Halloran*, 11 Minn. 253. The case would have been in no essential particular different had the State authorized the company by statute to appropriate the particular property in question, and the owners to bring suit against the company in the courts of law for its value. That a suit of that kind could be transferred from the State to the Federal court, if the controversy were between the company and a citizen of another State, cannot be doubted. And we perceive no reason against the transfer of the pending case that might not be offered against the transfer of the case supposed."

That the condemnation proceedings under the Iowa Code did not become suits or civil actions in the state courts of Iowa until the appeals were lodged and docketed in the state district court is clear from the following expression of the Iowa Supreme Court in *Myers* v. *Chicago & N. W. Ry. Co.*, 118 Iowa 312, 315-316, 91 N.W. 1076, 1078:

"From these statutes it plainly appears that the proceeding before the commissioners appointed by the sheriff to appraise the land is not a suit at law, but in the nature of an inquest to ascertain its value. No hearing is had, and no evidence introduced. The commissioners merely inspect the land, determine upon the amount of damages which will be occasioned by the appropriation, and make a written report to the sheriff. Thus far then the proceeding is in no respect a suit.

* * * * * * *

"Unless in court, or before those exercising judicial functions, the proceeding cannot be regarded as a suit. (Citing cases) That the proceeding to condemn land is not a suit, within the language of the removal acts of congress, and is such after the appeal to the district court,

seems to be conclusively settled against the appellees in *Boone Co. v. Patterson*, 98 U.S. 403, 25 L. Ed. 207, and *Railroad Co. v. Myers*, 115 U.S. 1, 5 S. Ct. 1113, 29 L. Ed. 312. See, also, *Scarl v. School Dist.*, 124 U.S. 197, 8 S. Ct. 460, 31 L. Ed. 415."

But the question of whether the proceedings were removable at the time of the attempted appeal to the federal court from the commissioners' award is beside the point in determining the existence of a *right of appeal* of those proceedings to the federal court. The short and simple answer to the Rock Island's contention that it had the right of direct appeal from the commissioners' award to the federal court is that there was no right of appeal from the commissioners' award to the federal court provided for in the state Code and Rule 71A confers none. No such right exists.

It is apparent from what has already been said that the proceedings were removable from the state district court to the United States District Court at the time the petitions for removal were filed. But the question is whether the Rock Island could remove them. Under the present removal statute, 28 U.S.C.A. Sec. 1441(a) heretofore quoted in a footnote, only a defendant has that right. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 61 S. Ct. 868.

In *Mason City & Fort Dodge R. Co. v. Boynton*, 204 U.S. 570, 51 L. Ed. 629, 27 S. Ct. 321, the Supreme Court held that a railroad company condemning land under the Iowa Code was the plaintiff and the landowner the "defendant" for the purpose of removal. In that case the Supreme Court noted, but disregarded, the Iowa Supreme Court's construction of the laws of Iowa governing condemnation. The Iowa court had construed its statutory law in such proceedings as placing the railroad condemnor in the position of an actual as well as nominal defendant after the proceedings had progressed to the point of the ascertainment of the amount of damages. *Myers v. Chicago & N. W. Ry.*

Co., 118 Iowa 312, 91 N.W. 1076. That is the stage at which the present proceedings stand.* The Supreme Court, in laying aside the argument that the state decision, holding that the railroad was the actual defendant and had the right to remove, was controlling, said:

"But this court must construe the Act of Congress regarding removal. And it is obvious that the word defendant as there used is directed toward more important matters than the burden of proof or the right to open and close."

The court then considered the Iowa statute as a whole and reached the conclusion that, properly construed and evaluated, the condemnor under that statute is the plaintiff for purposes of removal, despite the holding of the state court to the contrary.

For present purposes we may not pay heed to the opinion, frequently expressed with considerable logic by courts and writers other than the Iowa Supreme Court, that in eminent domain proceedings which have reached this stage the landowner becomes the plaintiff for all practical purposes. For we are of course to follow the Supreme Court in *Mason City* v. *Boynton* if subsequent decisions of the Supreme Court have not directed a different course. We come to the effect of *Erie* v. *Tompkins*, 304 U.S. 64, upon the present situation.

Mason City v. *Boynton* was decided long before *Erie* v. *Tompkins*. The latter decision was, at the time of its announcement, and thereafter, recognized by the bench and the bar as changing the previous concept of the controlling

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*The trial court was of the opinion that the present case was distinguishable from *Mason City* v. *Boynton* because here the Rock Island had irrevocably taken the property condemned whereas in *Mason City* v. *Boynton* some emphasis was given to the fact that the railroad had not done so but was free to elect to abandon the condemnation proceedings if the final assessment of damages was greater than it chose to pay. While there is that clear factual difference between this case and *Mason City* v. *Boynton*, we are not convinced that the result reached in that case would have been different if, as here, there had been an irrevocable taking.

deference to be given rules of decision of state courts on questions of substantive law in diversity cases. No longer is there doubt as to the duty of federal courts to follow the law of the state on such questions. In *Mason City* v. *Boynton* the importance of the present question is recognized by the language of the above-quoted excerpt from the opinion. The determination of the question now before us determines, among other rights, the right of a party to the benefits of the Removal Act, a right universally recognized as both valuable and important. We would be constrained to apply the rule of *Erie* v. *Tompkins* and treat the right of a party to be characterized as a defendant for the purpose of having the benefit of the right of removal as a substantive matter to be determined by the state on questions arising locally were it not for what appears to us to be the controlling effect of the *Shamrock* case.[1] For, indeed, it would seem that the Iowa Supreme Court would be best able to evaluate the effect of the Iowa Code in this regard, and, having done so, that the federal courts should bow to the construction placed upon a local statute by the highest court of the state. The long-established rule in that regard was reiterated only last month in *Albertson* v. *Millard*, ... U.S. ...., wherein the court said:

"Interpretation of state legislation is primarily the function of state authorities, judicial and administrative. The construction given to a state statute by the state courts is binding upon federal courts."

Also cf. *Dice* v. *Akron, C. & Y. R. Co.*, 342 U.S. 359 (dissenting opinion). But in the light of *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U.S. 100, 85 L. Ed. 1214, 61 S. Ct. 868, we may not do so. *Erie* v. *Tompkins* was decided April 25, 1938, as most everyone now knows. The *Shamrock-Sheets* case was decided April 28, 1941. While from the printed

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[1] See also *Chicago, M. & St. P. Ry. Co.* v. *Drainage Dist. No. 8*, 253 F. 491 (D.C. Iowa).

summarization of the argument for petitioner, found preceding the opinion, it does not appear that the rule of *Erie* v. *Tompkins* was specifically interposed in the *Shamrock* case, yet the rule of *Erie* v. *Tompkins* could not well have been overlooked. We may confidently assume that if the rule of *Erie* v. *Tompkins* should have been applied, it would have been applied in the *Shamrock* case. But instead of applying that rule we find that the Supreme Court, referring to *Mason City & Fort Dodge* v. *Boynton, supra,* said in the *Shamrock* case:

"Petitioner argues that although nominally a plaintiff in the state court it was in point of substance a defendant to the cause of action asserted in the counterclaim upon which, under Texas procedure, judgment could go against the plaintiff in the full amount demanded. (Citing cases) *But at the outset it is to be noted that decision turns on the meaning of the removal statute and not upon the characterization of the suit or the parties to it by state statutes or decisions. Mason City & Ft. Dodge R. Co.* v. *Boynton,* 204 U.S. 570. The removal statute, which is nationwide in its operation, was intended to be uniform in its application, unaffected by local law definition or characterization of the subject matter to which it is to be applied. Hence the Act of Congress must be construed as setting up its own criteria, irrespective of local law, for determining in what instances suits are to be removed from the state to the federal courts." (Italics supplied)

And prior to *Erie* v. *Tompkins* the Supreme Court announced a similar doctrine in *Road District* v. *St. Louis S. W. Ry. Co.,* 257 U.S. 547, 557:

"But it is said that the State Supreme Court [of Arkansas] has held otherwise and that such a decision is binding on us. The question of removal under the federal statute is one for the consideration of the federal court. It is not concluded by the view of a state court as to what is a suit within the statute. *Upshur County* v. *Rich,* 135 U.S.

467, 477; *Mason City & Fort Dodge R. R. Co.* v. *Boynton*, 204 U.S. 570; *Madisonville Traction Co.* v. *St. Bernard Mining Co.*, 196 U.S. 239. While the decision of the state court as to the nature of a proceeding under state statutes sought to be removed is, of course, very persuasive, it is not controlling because involved in the application of a federal statute and the exercise of a federal constitutional right. The issue as to removal is akin to the question, which sometimes arises in enforcing the inhibition against state laws impairing the obligation of a contract, whether there is a contract under state law. This court decides that for itself. *University* v. *People*, 99 U.S. 309; *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436; *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116; *Delmas* v. *Insurance Co.*, 14 Wall. 661."

Hence both before and after *Erie* v. *Tompkins* the rule followed in construing and applying the removal statute has remained the same.

In our judgment we are bound by the *Mason City* case and the *Shamrock* case and must hold that the Rock Island Railroad was not a defendant within the meaning of the removal statute and could not, therefore, remove the civil actions from the district court of Iowa to the federal court. The judgment of the trial court dismissing the direct appeal from the commissioners' award to the United States District Court is affirmed.

The order of the trial court denying the motion to remand the proceedings removed from the district court of Iowa to the United States District Court is reversed with directions to grant the motion and remand the cause.

The question of whether the Rock Island could have initiated the proceedings in the United States District Court is not before us for the simple reason that it did not do so and hence the propriety of such action is not presented. We express no opinion on that subject.

[fol. 91] (Judgment in Causes Nos. 14,724, 14,725 and 14,726.)

United States Court of Appeals
For The Eighth Circuit.

September Term, 1952.

Chicago, Rock Island and Pacific Railroad Company, Appellant,
No. 14,724. vs.
Archie C. Stude, William Lumpkin and Pottawattamie County, Iowa.

Appeal from the United States District Court for the Southern District of Iowa.

Archie C. Stude, Cross-Appellant,
No. 14,725. vs.
Chicago, Rock Island and Pacific Railroad Company.

Appeal from the United States District Court for the Southern District of Iowa.

and

Archie C. Stude and William Lumpkin, Appellants,
No. 14,726. vs.
Chicago, Rock Island and Pacific Railroad Company.

Appeal from the United States District Court for the Southern District of Iowa.

These causes came on to be heard on the joint record of proceedings in the United States District Court for the Southern District of Iowa printed pursuant to stipulation of parties, and were argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the said Dis-[fol. 92] trict Court dismissing the direct appeal of the Chicago, Rock Island and Pacific Railroad Company to the United States District Court from the Commissioners' award be, and hereby is, affirmed.

It is further Ordered and Adjudged by this Court that the Order of the said trial court denying the motion of the

landowners to remand the proceedings removed from the District Court of Iowa in and for Pottawattamie County to the United States District Court is by this Court hereby reversed with costs and with directions to grant the motion and remand the cause.

And it is further Ordered and Adjudged by this Court that Archie C. Stude, Cross-appellant in cause No. 14,725, have and recover from the Chicago, Rock Island and Pacific Railroad Company the sum of Twenty-five and no/100 ($25.00) Dollars, Clerk's general costs in said cause in this Court, and that Archie C. Stude and William Lumpkin, appellants in Cause No. 14,726, have and recover from the Chicago, Rock Island and Pacific Railroad Company the sum of Twenty-five and no/100 ($25.00) Dollars, Clerk's general costs in said cause in this Court, and one-half (½) of the taxable cost of printing the record on the three appeals to this Court, amounting to One Hundred Thirty-three and 10/100 ($133.10) Dollars, according to affidavit of counsel for the landowners and letters of counsel for the respective parties, and that executions issue for the respective amounts.

June 17, 1953.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, Appellant, vs. ARCHIE C. STUDE, WILLIAM LUMPKIN and POTTAWATTAMIE COUNTY, IOWA, Appellees.	No. 14,724.
ARCHIE C. STUDE, Cross-Appellant, vs. CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, Cross-Appellee.	No. 14,725.
ARCHIE C. STUDE and WILLIAM LUMPKIN, Appellants, vs. CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, Appellee.	No. 14,726.

Appeal and Cross-Appeal From United States District Court for the Southern District of Iowa, Wm. F. Riley, Judge.

PETITION FOR REHEARING

On Behalf of Chicago, Rock Island and Pacific Railroad Company and

BRIEF IN SUPPORT THEREOF.

THE CASE.

The court will recall that these appeals present the following legal questions:

1. May a non-resident condemnor of real estate under state law, commence an action as plaintiff, in the United States District Court, for a judicial determination of the

amount which it must pay a landowner for land appropriated, when applicable state statutes provide only for an appeal to a state court, and make the case triable there by ordinary proceedings before a court and jury?

2. May a non-resident condemnor of real estate who follows the administrative procedure prescribed by state law of eminent domain, and then appeals from the award of such administrative tribunal to a state court, remove the action to the Federal District Court for trial?

The District Court for Southern Iowa ruled that the non-resident condemnor might have instituted its eminent domain proceeding initially in the United States District Court, and, having elected to proceed under the applicable state law in an administrative proceeding before the County Sheriff, it could not thereafter institute a civil action as plaintiff in a Federal Court; also since diversity of citizenship and requisite jurisdictional amount existed, the condemnor might follow applicable state law, appeal to the state tribunal as provided by state statutes, and remove the case to the appropriate District Court.

THE OPINION OF THIS COURT.

By its opinion filed April 30, 1953, this court rejected the reasoning by which the District Court had arrived at the conclusion that condemnor's complaint as a plaintiff should be dismissed. This court held that:

> "The question of whether the Rock Island (condemnor and petitioner herein) could have initiated the proceedings in the United States District Court is not before us * * *. We express no opinion on that subject."

This court then disposed of the appeal in No. 14,724 by saying:

"The short and simple answer to the Rock Island's contention that it had the right of direct appeal from the commissioner's award to the federal court is that there was no right of appeal from the commissioners' award to the federal court provided for in the state Code and Rule 71A confers none. No such right exists."

With respect to question 2 set forth above, the opinion holds that under **Mason City & Fort Dodge R. Co. v. Boynton**, 204 U. S. 570, 51 L. Ed. 629, 27 S. Ct. 321, and **Shamrock Oil & Gas Corp. v. Sheets**, 313 U. S. 100, 85 L. Ed. 1214, 61 S. Ct. 868, the Rock Island (condemnor) was not a defendant within the meaning of the removal statute, 28 U. S. C. A., Sec. 1441, and could not, therefore, remove the action to the District Court.

Under the decision of this court, although state law provides for a judicial action triable by ordinary proceedings, a non-resident condemnor is denied the privilege of instituting that civil action in an appropriate United States District Court because state laws prescribe only an appeal to a state court; thus, a non-resident condemnor may not, because of the procedural provisions prescribed by state laws, be a plaintiff in the United States District Court. On the other hand, a non-resident condemnor of real estate may not appeal to the state tribunal prescribed by statute and remove the action to the Federal court because it is not a defendant within the meaning of the removal statues.

Thus, it is plain that the provisions of 28 U. S. C. A., Sec. 1332 and Sec. 1441 have been so construed as to completely deny to a non-resident condemnor of real estate the right to resort to the United States District Court solely because of procedural provisions of state statutes.

POINTS TO BE ARGUED.

I.

The District Courts of the United States have jurisdiction in "civil actions" involving eminent domain proceedings, instituted under applicable state laws, when requisite diversity of citizenship and jurisdictional amount exist. Rule 71A clearly recognizes this jurisdiction. The opinion of this court erroneously makes the right of petitioner to resort to the United States Courts dependent upon state law.

28 U. S. C. A., Sec. 1332.

II.

Purely procedural state laws may neither deny, restrict nor enlarge the jurisdiction of the courts of the United States. The jurisdiction of the United States Courts and the right to resort thereto are created solely by Federal statutes. The decision of this court denies to appellant in No. 14,724 a right granted by 28 U. S. C. A., Sec. 1332.

Davis v. Gray, 16 Wall. 203, 21 L. Ed. 447;

Landon v. Public Utilities Commission, 234 Fed. 152, 164;

Burford et al. v. Sun Oil Co. et al., 319 U. S. 315, 87 L. Ed. 1424;

In re Mississippi River Power Co., 241 Fed. 194.

III.

The conclusion reached by this court, denying to a nonresident condemnor the right to resort to the United States Courts for determination of its liability to pay for lands appropriated, directly conflicts with the decisions of the

Supreme Court of the United States, the prior decisions of this court and the decisions of courts of appeal in other circuits of the United States.

IV.

The opinion of this court erroneously construes the opinions of the United States Supreme Court in **Mason City & Fort Dodge R. Co. v. Boynton** and **Shamrock Oil & Gas Corp. v. Sheets.**

ARGUMENT.

POINTS I, II AND III.

The opinion of this court first summarizes the Iowa statutes on the subject of eminent domain; the court then states that the appellant railroad company (Rock Island) contends that it had the right of appeal direct from the commissioners' award filed with the sheriff to the United States District Court. The court then says that no such right of appeal exists. The balance of the opinion is devoted to the question of removability of the appeal taken to the state court, and with the application of the rule of **Erie Railroad Co. v. Tompkins** to the situation here presented.

We have signally failed to make our position in this case clear to the court. We do not urge that the Iowa statutes give to the Rock Island a right of appeal direct from the award made by the sheriff's commission to the United States District Court. What we contend is simply that the statutes of Iowa have created certain substantive rights, which may be acquired under the state power of eminent domain, and provided for the determination of any controversy with respect to those rights by a civil action triable by ordinary proceedings. Of course, the administrative steps prescribed by state law to acquire rights under the power of eminent domain cannot be exercised by a proceeding in the United States District Court, but when these rights have been acquired, a civil action to determine the amount which a condemnor must pay may be brought either in the state court, or in a United States District Court, if diversity of citizenship and the requisite jurisdictional amount are present. In the early case of **Davis v. Gray**, 10 Wall. 203, 21 L. Ed. 447, the Supreme Court of the United States laid down the rule that:

"A party by going into a National court does not lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality. The wise policy of the Constitution gives him a choice of tribunals."

The problem presented by the record here is a relatively simple one, and the answer would be perfectly plain and obvious were it not for the fact that the Iowa statute prescribes an "appeal" from the sheriff's commission to the district court. For example, had the Iowa statute provided for the appointment of commissioners and the making of an award and then said that either landowner or condemnor, if dissatisfied with the award, might bring an action in a court of competent jurisdiction to have the amount of compensation to which the landowner was entitled determined by ordinary proceedings, no question would arise. A non-resident condemnor would then clearly have the right to institute its suit either in the state court, or in an appropriate United States District Court.

Does the mere fact that Iowa statutes have provided for an "appeal" only to a state court deprive the national courts of jurisdiction? We believe not. The rule laid down by the Supreme Court of the United States and by the previous decisions of this court has long been that purely procedural state statutes may neither restrict, deny nor enlarge the jurisdiction of the Courts of the United States. It is one of the most fundamental and elementary rules of federal jurisprudence that the jurisdiction of the United States Courts and the right of a litigant to resort to such courts are governed solely by federal statutes.

The situation here presented is quite comparable with that in the recent case of **Burford et al. v. Sun Oil Co. et al.**, 319 U. S. 315, 87 L. Ed. 1424. It there appeared that the State of Texas had adopted by statute a rationing scheme, regulating the drilling of oil wells within its

borders. An administrative proceeding before the Texas Railroad Commission was prescribed and anyone aggrieved by a decision of the commission might appeal to the Texas courts. Then Gulf Co. filed a complaint in the U. S. District Court, by which it sought cancellation of a permit issued to Buford by the State Commission allowing him to haul sand, etc. The trial court dismissed the complaint on the ground that because of the public nature of the questions the parties should be relegated to the state courts in the first instance. The Court of Appeals for the Fifth Circuit reversed and the Supreme Court granted certiorari. Black, in speaking for the Supreme Court of the United States, Mr. Justice Black said:

> "Jurisdiction of the federal court was invoked because of the diversity of citizenship of the parties, and because of the Commission's contention that the order denied them due process of law. There is some argument that the action is an 'appeal' from the State Commission to the federal court, since an appeal to a State court can be taken under relevant Texas statutes; but, of course, the Texas legislature may not make a federal district court, a court of original jurisdiction, into an appellate tribunal or otherwise expand its jurisdiction, and the Circuit Court of Appeals in its decision correctly viewed this as a simple proceeding in equity to enjoin the enforcement of the Commission's order."

A majority of the Supreme Court concluded that the case was properly within the jurisdiction of the Federal District Court, but that, as a matter of sound, equitable discretion and because of possible conflict with state authorities, the district court should have declined to exercise that jurisdiction.

It is well established, as said by the late Judge Walter Sanborn in Landon v. Public Utilities Commission, 234 Fed. 152, at page 164, that:

"Rights created or provided by the statutes of the states to be pursued in the state courts may be enforced and administered in the national courts, either at law, in equity, or in admiralty, as the nature of the rights or remedies may require."

The mere fact that the state legislature provided for the service of a "notice of appeal" rather than the filing of a suit in the district court, and the service of an ordinary summons, or original notice, cannot defeat the right of a non-resident to resort to an appropriate federal tribunal. It is true that the Rock Island, appellant in No. 14,724, did serve upon the sheriff and upon the landowner a notice of appeal wherein it was stated that the appeal was being taken to the United States District Court. The Rock Island likewise filed a complaint in the United States District Court, caused a summons to be issued under the federal rules and served upon the landowner, requiring him to answer the complaint within twenty days after such service.

The "notice of appeal" to the United States District Court was necessary under the Iowa statute to prevent the award of the sheriff's commission from becoming a finality, for the statute (Sec. 472.17, Iowa Code 1950) expressly says that an award made by the commissioners shall be final unless appealed from. The service of the notice of appeal was, under the Iowa statute, necessary to convert the then purely administrative proceeding into a suit of a civil nature. But the fact that such a notice was served does not deprive a non-resident condemnor of his right to bring a civil action as prescribed by 28 U. S. C. A., Sec. 1332.

The situation here presented is quite parallel with that which was before the United States District Court for Southern Iowa in the case of In re Mississippi River Power Co., 241 Fed. 194. That case involved the tax assessment

upon a dam in the Mississippi River. The local assessor assessed the property at $4,000,000 and imposed a 100% penalty for refusal of the property owner to make the proper return. When the assessment came before the Board of Review provided for by the Iowa statutes, the power company filed objections and the Board reduced the assessment to $600,000. The assessor, as authorized by statute, then appealed to the state court and the power company removed to the United States District Court. It was contended that the appeal was not a suit. District Judge Wade pointed out that the statute made the proceeding triable in equity and that any party aggrieved had a right of appeal to the Supreme Court of the state. The opinion concludes:

> "So there cannot be any serious question but that the proceedings upon appeal are judicial in character, and the only remaining question is whether or not such judicial proceedings constitute a suit for removal purposes."

We submit that the opinion of this court erroneously makes the right of a nonresident to resort to a federal court in a diversity case dependent upon the procedural steps prescribed by state statutes. This is contrary to every principle of federal jurisprudence. The long established rule is that the jurisdiction of United States Courts and the right of a litigant to resort to such a court cannot be restricted nor enlarged by state statutes.

Perhaps, unfortunately, appellant's opening brief in this cause was not prepared by the writer of this petition because of conditions of health. The rules of this court restrict a reply brief to fifteen pages. We successfully complied with that rule, but in doing so, we apparently failed to make our position plain. We believe that upon further consideration, this court should conclude that the opinion handed down on April 30, 1953, should be withdrawn and

the case resubmitted on the issue of the right of a non-resident condemnor to bring his suit for the determination of the compensation to which an Iowa landowner is entitled in the federal tribunal.

The Removal Question.

By the opinion of April 30, 1953, this court holds that the decisions of the Supreme Court of the United States in Mason City & Fort Dodge R. Co. v. Boynton, 204 U. S. 570, 51 L. Ed. 629, 27 S. Ct. 321, and **Shamrock Oil & Gas Corp. v. Sheets**, 313 U. S. 100, 85 L. Ed. 1214, 61 S. Ct. 868, a railroad company condemning land under the Iowa Code is the plaintiff, and the landowner is the defendant for purposes of removal. We desire to call to the attention of this court the fact that the Boynton case involved solely a certified question reading as follows:

> "Was the landowner a defendant within the meaning of the removal statute?"

The Supreme Court of the United States answered, "Yes." Justice Holmes there expressly pointed out that his opinion was not to be construed as overruling the Iowa case of **Myers v. C. N. W. R. Co.**, 118 Iowa 312, 91 N. W. 1076.

The Shamrock case was not a condemnation action. There plaintiff, a non-resident of the state, commenced his action for recovery of less than the jurisdictional amount of $3,000. The defendant filed a counterclaim for more than $3,000, and the plaintiff sought to remove the action to the federal court. The Supreme Court of the United States held that the mere filing of the counterclaim did not convert the plaintiff in the suit into a defendant within the meaning of the removal statute.

Here, as Justice Holmes pointed out in the opinion in the Boynton case, the terms, plaintiff and defendant, as

applied to condemnation proceedings, can be used only in an uncommon and liberal sense. The only issue presented by the pleadings is the amount to which the landowner is entitled. Upon the trial of the case the award made by the sheriff's commission may be increased or decreased. If increased, the condemnor must pay the additional amount, together with an attorney's fee. We do not believe that either of the cases relied upon in the opinion of this court constitute authorities supporting the court's conclusion.

We respectfully request that a rehearing be granted.

R. L. READ,
A. B. HOWLAND,
B. A. WEBSTER, JR.,
500 Bankers Trust Building,
Des Moines 9, Iowa,
Attorneys for Appellant, No. 14,724, Cross-Appellee, No. 14,725, Appellee, No. 14,726.

Certificate of Counsel.

The above and foregoing petition for rehearing has been personally prepared by the undersigned. The petition is filed in good faith, and I firmly believe it to be meritorious and worthy of the consideration of the court.

A. B. Howland,
500 Bankers Trust Building,
Des Moines 9, Iowa,
Attorney for Appellant, No. 14,724, Cross-Appellee, No. 14,725, Appellee, No. 14,726.

(Endorsed): Filed in U. S. Court of Appeals, May 13, 1953.

[fol. 105] (Opinions on Denial of Petition for Rehearing in Causes Nos. 14,724, 14,725 and 14,726.)

United States Court of Appeals
For The Eighth Circuit.

No. 14,724.

Chicago, Rock Island and Pacific Railroad Company,
Appellant,
vs.
Archie C. Stude, William Lumpkin and Pottawattamie County, Iowa,
Appellees.

Appeal from the United States District Court for the Southern District of Iowa.

No. 14,725.

Archie C. Stude,
Cross-Appellant,
vs.
Chicago, Rock Island and Pacific Railroad Company,
Cross-Appellee.

Cross-Appeal from United States District Court for the Southern District of Iowa.

No. 14,726.

Archie C. Stude and William Lumpkin,
Appellants,
vs.
Chicago, Rock Island and Pacific Railroad Company,
Appellee.

Appeal from the United States District Court for the Southern District of Iowa.

[June 17, 1953.]

On Denial of Petition for Rehearing.

Before GARDNER, Chief Judge, and THOMAS and COLLET, Circuit Judges.

COLLET, Circuit Judge.

On petition for rehearing it is asserted that we should have treated the appeal from the award of the sheriff's commission to the United States District Court, and the subsequent filing of a complaint in the United States District Court, as an original proceeding in that court and should have held that the United States District Court had jurisdiction on grounds of diversity of citizenship, as was done in *Burford* v. *Sun Oil Co.*, 319 U.S. 315. In our judgment there is no justification for placing that interpretation on the record. The condemnor did not file its action in the United States District Court, as was done in the Burford case. It strictly followed the Iowa procedure for initiating a condemnation suit in the Iowa state courts. The complaint that was filed in the United States District Court after the appeal was lodged there was required by the Iowa statute, and a similar complaint was filed in the Iowa District Court after the appeal to that court. The complaint filed in the United States District Court cannot be treated as having created an original action in the federal court. It is correct, as the Rock Island contends, that the Iowa legislature could not restrict or enlarge the jurisdiction of the federal court by procedural statutes, and we must not be understood to have so held. It may well be that if this action had been commenced in the United States District Court, that court would have had jurisdiction. But actions are not initiated in the federal courts by filing with a sheriff a request that he appoint commissioners to assess damages. It might also be that if the action had been initiated in the federal court that that court would have followed the Iowa procedure under Rule 71A. But it

was not asked to do so. And we do not pass upon that question because it, like the question of whether the action could have been initiated in the federal court, is not in the case.

The petition for rehearing must be and is denied.

Judge Gardner is of the opinion that the petition should be granted.

GARDNER, Chief Judge, Dissenting.

I am not in accord with the views of the majority of the court as above expressed. The primary facts as distinguished from the interpretation of those facts are fairly recited in the original opinion (.... F.2d ....) and need not be here repeated.

In our original opinion, referring to the contention of the Rock Island that the District Court had original jurisdiction in the proceeding, we said:

"The question of whether the Rock Island could have initiated the proceedings in the United States District Court is not before us for the simple reason that it did not do so and hence the propriety of such action is not presented. We express no opinion on that subject."

This pronouncement is vigorously challenged by the petition for rehearing, and in the foregoing opinion by the majority of this court this position is reaffirmed in the following words:

"On petition for rehearing it is asserted that we should have treated the appeal from the award of the sheriff's commission to the United States District Court and the subsequent filing of a complaint in the United States District Court as an original proceeding in that court and should have held that the United States District Court had jurisdiction on grounds of diversity of citizenship, as was done in *Burford* v. *Sun Oil Co.*, 319 U.S. 315. In our judg-

ment there is no justification for placing that interpretation on the record. The condemnor did not file its action in the United States District Court, as was done in the Burford case."

It is clear that the question presented is as to the jurisdiction of the District Court. There was diversity of citizenship and the amount involved exceeded the jurisdictional requisite. The authority to determine the requisites to jurisdiction in the Federal courts in diversity of citizenship cases is vested in Congress. By Section 1332, Title 28 U.S.C., it is provided that "(a) the district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between: (1) Citizens of different States; * * *." If these prerequisites exist the court is without authority to deny access to the Federal court to any litigant having the qualifications fixed by Congress.

It is said in the majority opinion that the original jurisdiction of the District Court was not invoked by the Rock Island. It is true it had complied with the Iowa statute by proceedings before a Sheriff's Commission and those proceedings were not of a judicial character. The Iowa statute, however, provides that unless an appeal is taken within the specified period the award so made shall become final and an appeal to the State District Court was perfected in accordance with the Iowa statute. Notice of appeal to the United States District Court was served and I think that was a nullity. However, the jurisdiction of the trial court was not invoked by the service of this notice of appeal but it appears from the record and stands without dispute that "On March 7, 1952, the Chicago, Rock Island and Pacific Railroad Company filed in the office of the Clerk of the United States District Court for the Southern District of Iowa, Southern Division, the following Complaint." The complaint alleges diversity of citizenship; it alleges that

the amount or value involved exceeds $3,000, exclusive of interest and costs; it alleges facts showing that the Rock Island was authorized by proper certificate from the Interstate Commerce Commission to construct a new line of railroad; that it had been authorized to institute condemnation proceedings for the lands described in the complaint; that pursuant to provisions of the Iowa statute it had instituted proceedings in eminent domain before the sheriff of Pottawattamie County, Iowa; that an award had been made which it is alleged was excessive. The complaint ends with the prayer,

"Wherefore, plaintiff prays that upon the trial of this cause the damages sustained by the lands of Archie C. Stude, by reason of the appropriation of the lands hereinbefore described, be fixed at not to exceed $10,000, and that plaintiff have such further relief as may be just and proper under the circumstances."

Not only was this complaint filed but the record recites that "Summons was issued by the Clerk of the United States District Court for the Southern District of Iowa on March 7, 1952, addressed to Archie C. Stude, William Lumpkin and Pottawattamie County, in the usual form, citing the defendants named 'to answer the Complaint, copy of which is herewith served upon you, within twenty days after service of this summons upon you.' " The record also shows that the summons was served by the United States Marshal on all defendants.

The Federal Rules of Civil Procedure, promulgated by the Supreme Court pursuant to congressional authorization and hence having the effect of law, provide the manner in which the jurisdiction of the District Court shall be invoked.

Rule 3 provides:

"A civil action is commenced by filing a complaint with the court."

Rule 4(a) provides:

"Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver it for service to the marshal or to a person specially appointed to serve it. Upon request of the plaintiff separate or additional summons shall issue against any defendants."

After the proceedings before the Sheriff's Commission had been had this proceeding became a civil action. *Lewis Eminent Domain*, Vol. 2, 3rd Ed., Sec. 513; *Metropolitan R. Co.* v. *District of Columbia*, 195 U.S. 322; *Chappell* v. *United States*, 160 U.S. 499; *Kohl* v. *United States*, 91 U.S. 367. Plaintiff, having exhausted its administrative remedies provided by the Iowa statute, had at the time of filing its complaint a civil action, and the allegations of the complaint plainly show that it was invoking the jurisdiction of the Federal court on the ground that a diversity of citizenship existed and the requisite amount to confer jurisdiction was involved. In other words, these allegations of the complaint were the basis of its right of access to the Federal court—not that it was in Federal Court because it had appealed from the Commissioners' award. The mere fact that the attempted appeal from the commissioners' award was not warranted and did not in itself confer jurisdiction, did not preclude the Rock Island from invoking the original jurisdiction of the Federal Court on the grounds set out in its original complaint. All the essentials to jurisdiction designated by Act of Congress being present, it seems illogical to hold that the court has been deprived of that jurisdiction and that plaintiff has been deprived of the right of access to the Federal Court which by legislative act it is entitled to.

A somewhat similar situation was presented to the Supreme Court in *Burford* v. *Sun Oil Co.*, *supra*. In passing it may be noted that this case was not cited in appellant's

original brief and was not otherwise called to our attention until petition for rehearing. In the course of the opinion in that case it is among other things said:

"Jurisdiction of the federal court was invoked because of the diversity of citizenship of the parties, and because of the Companies' contention that the order denied them due process of law. There is some argument that the action is an 'appeal' from the State Commission to the federal court, since an appeal to a state court can be taken under relevant Texas statutes; but of course the Texas legislature may not make a federal district court, a court of original jurisdiction, into an appellate tribunal or otherwise expand its jurisdiction, and the Circuit Court of Appeals in its decision correctly viewed this as a simple proceeding in equity to enjoin the enforcement of the Commission's order."

In that case, as in the instant case, proceedings had been had before a commission and there was an attempted appeal to the Federal Court but the plaintiff had, as in the case at bar, filed an original complaint and jurisdiction was invoked by the filing of that complaint. I think there is no warrant for the assertion that in this case the plaintiff did not institute an original proceeding in the Federal Court by the filing of its complaint. All the prerequisites to that jurisdiction were present. Not only were all the necessary prerequisites of jurisdiction present but the jurisdiction has been invoked in literal compliance with the Federal Rules of Civil Procedure. In these circumstances I am of the view that the Chicago, Rock Island and Pacific Railroad Company can not lawfully be denied access to the Federal Court.

I would grant the petition for rehearing.

[fol. 113] (Order denying petition of Chicago, Rock Island and Pacific Railroad Company for Rehearing, in Causes Nos. 14,724, 14,725 and 14,726.)

September Term, 1952.

Wednesday, June 17, 1953.

Petition for rehearing on behalf of Chicago, Rock Island and Pacific Railroad Company and brief in support has been considered by the Court, and It is now here Ordered that said Petition be, and is hereby, denied in accordance with opinion of the majority of this Court this day filed herein.

June 17, 1953.

[fol. 114] (Order Staying Issuance of Mandate in Causes Nos. 14,724, 14,725 and 14,726.)

September Term, 1952.

Monday, July 6, 1953.

On Consideration of the motion of the Chicago, Rock Island and Pacific Railroad Company for a stay of the issuance of the mandate of this Court in these causes until August 1, 1953, and the resistance of Archie C. Stude and William Lumpkin thereto, pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here Ordered by this Court that the issuance of the mandate in these causes be, and the same is hereby, stayed until August 1, 1953, and if within this stay there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of said petition by the Supreme Court.

July 6, 1953.

[fol. 115] (Praecipe of Matters to be included in Record for Supreme Court, U. S., in Causes Nos. 14,724, 14,725 and 14,726.)

To Mr. E. E. Koch, Clerk of the United States Court of Appeals for the Eighth Circuit:

In preparing the record in the foregoing cases to be lodged with the Clerk of the Supreme Court of the United States together with a petition for writ of certiorari, please include the following designated portions of the points or propositions of law relied upon, with citations of authorities, from the briefs of the parties, to-wit:

1. From the brief of appellant in case No. 14,724, Propositions of Law Relied Upon and Citations, points I to III, inclusive, appearing on pages 8 and 9 thereof.

2. From the brief of appellees in case No. 14,724, points to be Argued with Citations, comprising points I to IV, inclusive, appearing on pages 7 to 11, inclusive of said brief, and also from the brief of Cross-appellant in No. 14,725, and brief of appellants in No. 14,726, points I and II, appearing on pages 57 and 58 and 59 of said brief.

3. From the Reply brief of appellant in No. 14,724, points to be Argued in Reply, I, II and III, appearing on pages 1 and 2 of said brief, and from the brief of appellee in No. 14,725 and No. 14,726, point to be Argued I, appearing on page 18 thereof.

R. L. READ,

A. B. HOWLAND,

and

B. A. WEBSTER, JR.,
Attorneys for Chicago, Rock Island and Pacific Railroad Company.

[fol. 116] (Endorsed): Filed in U. S. Court of Appeals, Jul. 2, 1953.

[fol. 117] (Clerk's Certificate.)

United States Court of Appeals
for the Eighth Circuit.

I, E. E. Koch, Clerk of the United States Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains printed consolidated record on which the appeals were heard in said Court of Appeals, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinions, had and filed in the United States Court of Appeals for the Eighth Circuit, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in certain causes wherein Chicago, Rock Island and Pacific Railroad Company was Appellant and Archie C. Stude, William Lumpkin and Pottawattamie County, Iowa, were Appellees, No. 14,724, Archie C. Stude was Cross-Appellant and Chicago, Rock Island and Pacific Railroad Company was Cross-Appellee, No. 14,725, and Archie C. Stude and William Lumpkin was Appellant and Chicago, Rock Island and Pacific Railroad Company was Appellee, No. 14,726.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, on the 7th day of July, A. D. 1953.

E. E. KOCH,
Clerk of the United States Court of Appeals for the Eighth Circuit.

(Seal)

[fol. 118] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. 209

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, Petitioner,

vs.

ARCHIE C. STUDE, WILLIAM LUMPKIN and POTTAWATTAMIE COUNTY, IOWA

ORDER ALLOWING CERTIORARI—Filed October 12, 1953

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

The Chief Justice took no part in the consideration or decision of this application.

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JUL 27 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, A.D., 1953.

No. 209

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Petitioner,*

vs.

ARCHIE C. STUDE, WILLIAM LUMPKIN and POTTAWATTAMIE COUNTY, IOWA, *Respondents.*

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Petitioner,*

vs.

ARCHIE C. STUDE, *Respondent.*

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Petitioner,*

vs.

ARCHIE C. STUDE and WILLIAM LUMPKIN, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

BRUCE DWINELL,
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135 W. Van Buren Street,
Chicago, Illinois,
RALPH L. READ,
ALDEN B. HOWLAND,
300 Bankers Trust Building,
Des Moines 9, Iowa,
Attorneys for Petitioner.



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District Courts of the United States have original jurisdiction only in civil actions wherein diversity of citizenship is present and the controversy involves more than the jurisdictional amount of $3,000.

I-B 17

If state law provides for a judicial proceeding in its courts in eminent domain cases, and other jurisdictional requisites are present, the non-resident condemnor may commence its action, in the first instance in the United States District Court. The rule is otherwise in those states in which state law provides for an administrative proceeding, followed by a "civil action", triable in the courts of the state. When state law provides for an administrative proceeding, it may not be instituted in the United States District Court until the administrative procedure has been followed, and the controversy has become a "civil action"

II-A 21

After taking all steps required by state administrative procedure under Iowa law petitioner

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properly commenced its action in the United States District Court, if under Federal law, it be a plaintiff in such proceeding.

III-A 26
If petitioner be not a plaintiff in the proceeding, it is necessarily a defendant as provided by state law and, as such, entitled to remove the case from the state court to the United States District Court.

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IN THE

Supreme Court of the United States

October Term, A.D., 1953.

No.....

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Petitioner*,

vs.

ARCHIE C. STUDE, WILLIAM LUMPKIN and POTTAWATTAMIE COUNTY, IOWA, *Respondents*.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Petitioner*,

vs.

ARCHIE C. STUDE, *Respondent*.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Petitioner*,

vs.

ARCHIE C. STUDE and WILLIAM LUMPKIN, *Respondents*.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Petitioner, Chicago, Rock Island and Pacific Railroad Company, respectfully shows to this Honorable Court:

SUMMARY STATEMENT OF MATTER INVOLVED.

By the decision of the Court of Appeals for the Eighth Circuit, review of which is now sought, petitioner, a railroad corporation of Delaware, was denied access to the United States District Court for Southern Iowa to litigate

the amount of its liability to citizens of Iowa for the taking of ten parcels of Iowa real estate under Iowa law of eminent domain, although diversity of citizenship and jurisdictional amount with respect to each of the ten parcels were present. A majority of the judges who heard this case below held that since Iowa law provides only for an "appeal" to the state courts from the award of sheriff's commissioners, petitioner could not, as plaintiff, institute an action in United States District Court for Southern Iowa; and, since petitioner itself initiated the condemnation proceeding, it was not a defendant within the meaning of Tit. 28, Sec. 1441, U.S.C.A., although so designated by state statute, and, therefore, could not remove an appeal from the administrative award, docketed in the state court, to the United States District Court. Thus, the Eighth Circuit Court of Appeals, with its Chief Judge dissenting, ruled that because of statutory provisions found in the law of Iowa and many other states, the District Courts of the United States lacked jurisdiction over these civil actions, although in each instance, the controversy involves more than the jurisdictional amount and is wholly between citizens of different states.

Petitioner was authorized by certificate of the Interstate Commerce Commission to construct approximately 34 miles of new railroad line in Pottawattamie and Cass Counties, Iowa, and to abandon certain existing trackage. Certain landowners and others, including a number of respondents, opposed petitioner's plans before the Interstate Commerce Commission, and brought a suit in the United States District Court for Southern Iowa to set aside the Commission's certificate. A three judge District Court sustained the order of the Interstate Commerce Commission. (Not published in F. Supp.)

Petitioner acquired all necessary right of way except the ten parcels here involved; and with respect to those,

was authorized to institute condemnation proceedings by the Iowa State Commerce Commission. Since no statute of the United States grants railroad corporations power to condemn lands, petitioner was necessarily remitted to the laws of Iowa on that subject. In Iowa any railway corporation, when authorized by the State Commerce Commission, may condemn land for railroad purposes. The pertinent Iowa statutes are printed in the appendix, and are here briefly summarized:

(a) An administrative proceeding is initiated by the filing of a written application with the sheriff of the county in which the land to be condemned is located, describing the lands affected and to be condemned. (Sec. 472.13, Iowa Code 1950)

(b) The sheriff thereupon appoints a commission of six resident, disinterested freeholders of the county to assess the damages to all real estate in the county desired by the applicant.

(c) After notice to all owners and lienholders, this commission "views, if necessary, the land sought to be condemned", assesses the damages which the owner will sustain, and files a written report thereof with the sheriff. (Sec. 472.14, Iowa Code 1950)

(d) The appraisement of damages returned by the commission is final unless appealed from. (Sec. 472.17, Iowa Code 1950)

(e) Any party interested may within thirty days after the assessment is made "appeal therefrom to the district court." (Sec. 472.18) The "appeal" is docketed in the name of the owner of the land, or of the party otherwise interested and appealing, as plaintiff, and in the name of the applicant for condemnation, as defendant, and be tried as in an action by ordinary proceedings. (Sec. 472.21, Iowa Code 1950)

This Court, the Supreme Court of Iowa, and the United States Court of Appeals for the Eighth Circuit had all previously held that Iowa law prescribes a purely administrative proceeding, in the nature of an inquest, which is not judicial in character, or a "civil action" until the taking of an appeal from the commissioner's award.

See *Mason City & Fort Dodge R.R. Co. vs. Boynton*, 204 U.S. 570, 51 L.Ed. 629.

Myers vs. C&NW R.R. Co., 118 Iowa 512, 91 N.W. 1076.

Des Moines Water Co. vs. City of Des Moines, 206 Fed. 657.

Kaw Valley Drainage District vs. Metropolitan Water Co., 186 Fed. 315.

Because of the prior litigation with local residents, counsel for petitioner desired to initiate the necessary proceeding for condemnation in the United States Courts; but, in view of the decisions cited above, concluded that the United States District Court could not take jurisdiction over the administrative action prescribed by Iowa statutes. The proceeding before the sheriff is clearly not a "civil action" within the statute defining the original jurisdiction of District Courts. (See Tit. 28, Sec. 1332, U.S.C.A.) Petitioner, therefore, followed the procedure prescribed by Iowa statutes, and on January 18, 1952, filed with the Pottawattamie County Sheriff its application in writing for the appointment of commissioners and assessment of damages with respect to the ten parcels of real estate. After notice to the landowners, tenants and others interested, ten awards were made on February 12, 1952, aggregating more than $330,000, each of which very substantially exceeded $3,000. Petitioner deposited the amount of some of the awards with the sheriff and took possession of the land.

On March 7, 1952, petitioner, as plaintiff, filed in the office of the Clerk of the United States District Court for

Southern Iowa ten separately docketed complaints, in each of which the owners of the real estate condemned, their tenants and lienholders were designated as defendants. Each complaint alleged the filing of the administrative condemnation proceeding, the appointment of commissioners, the assessment of damages in favor of the landowner, and tenant, and a description of the lands condemned. It charged that the award was grossly excessive, unreasonable and far in excess of any actual damage sustained by defendants. The complaint recited that a notice of appeal from the award of the sheriff's commissioners had been served on the sheriff, the landowner and tenant, a copy which was made an Exhibit to the complaint. In the case of Archie C. Stude (Record 1), the complaint set forth an award of damages of $25,888.60 to the landowner and $1,000.00 to his tenant for taking of 24.47 acres, while it was claimed actual damage sustained did not exceed $10,000. Allegations of diversity of citizenship and jurisdictional amount appeared in each complaint. The prayer of each complaint was that the damages be fixed and determined upon the trial of the action.

Summons was duly issued by the Clerk of the District Court in each case in the usual form, citing all named defendants in each case to answer the complaint within twenty days after service (Record 9). The summons, accompanied by a copy of the complaint, was served on each defendant by the Marshal.

On March 10 and 11, 1952, petitioner served upon the sheriff and upon each landowner, and other interested party, notices of appeal to the District Court of Pottawattamie County, Iowa, in compliance with Iowa law, as to each of the ten parcels of real estate. Petitioner then filed the ten notices of appeal in the office of the Clerk of the Iowa Court, paid the filing fees and each case was there docketed on March 11, 1952. The landowner and tenant were designated

as plaintiffs and the railroad as defendant. On March 12, 1952, petitioner filed in the office of the Clerk of the United States District Court for Southern Iowa ten verified petitions for removal to that court of the ten actions pending in the Pottawattamie County, Iowa, District Court. These removal petitions contained all jurisdictional averments necessary for removal of cases to the United States District Court because of diversity of citizenship and amount in controversy. All requisite procedural notices and bonds were filed as prescribed by Tit. 28, Sec. 1442-45, U.S.C.A.

Thus, as to each parcel of real estate condemned, petitioner first filed an original complaint in the United States District Court, caused summons to be issued and served, and thereafter took all required steps under state law to appeal from the commissioners' awards to the state court, docketed the ten cases in the state court, and then removed these cases to the Federal District Court.

On March 24, 1952, the landowners filed in each original action instituted by petitioner, as plaintiff, motions to dismiss (Record 10-11, inc.), which challenged the jurisdiction of the United States Court on the ground that petitioner had elected to proceed under Chap. 472, Iowa Code 1950, and could not, having followed the procedure prescribed by Iowa law, invoke the jurisdiction of the United States District Court. On the same date, subject to such motions for dismissal, the landowners filed answers and counterclaims for damages (Record 12-17, inc.). On the same date in each of the ten removal cases, the landowners filed petitions as plaintiffs, as required by the Iowa statutes, and motions to remand the cases to the State Court on the ground that the District Court was without jurisdiction for the reason that the railroad "is not the defendant in said action within the meaning of Tit. 28, Sec. 1441, U.S.C.A., so as to be entitled to remove said action" (Record 49).

The motions to dismiss and to remand were heard by

the District Court on May 28, 1952. On July 19, 1952, District Judge William F. Riley filed a memorandum opinion and order which is set forth at Record 18-37, inc. After correctly outlining the prior proceedings (except for the statement that the appeals were first taken to the State Court), Judge Riley held that the condemnation proceeding prescribed by Iowa statutes was purely administrative, and not a "civil action"; that it was not until the case reached the courts by way of appeal that the proceeding became judicial in character. Numerous authorities from both state and Federal jurisdictions were cited in support of this conclusion. Judge Riley then stated that an action for condemnation of real estate is a civil action within the meaning of Tit. 28, Sec. 1352, U.S.C.A. and might have been commenced, in the first instance, in the United States District Court. Judge Riley ruled that petitioner, having followed state procedure in initiating the proceedings before the Pottawattamie County Sheriff, could not "go partly down the road of state procedure and then cut across from the sheriff's commissioners' award to this court" (Record 35). He likewise said that "it would be an unwarranted encroachment on the state's authority for this court to find and declare that the prescribed proceedings, despite their expressed and explicit detail, contemplate and permit an appeal from the commissioners' award directly to this court instead of to the court named by the General Assembly of Iowa" (Record 28-29).

In the ten removal cases Judge Riley's opinion pointed out that the only controversy before the court was the amount of damages to which the landowners and their tenants were entitled, that the taking of the land was complete, and that petitioner was "for every practical purpose at the time of the removal of these cases, both nominal and actual defendant" (Record 33). The motions to remand were overruled.

Petitioner appealed to the Court of Appeals for the Eighth Circuit from the judgments of dismissal (Record 39). The landowners filed what their counsel denominated a "notice of cross-appeal" in each of the cases which were dismissed. They likewise served notices of appeal from the orders overruling their motions to remand to the state court (Record 57-58). By stipulation of the parties, approved by the District Court, the appeals and cross-appeal were submitted on one printed record, the case of Archie C. Stutz, with the final judgment in that case to be entered in the other cases (Record 41-45, inc.). While petitioner contended that the orders overruling the motions to remand were not appealable orders, it consented that the Court of Appeals might determine the questions presented on both appeals.

On April 30, 1953, the opinion of the Court of Appeals was filed, affirming the judgment of dismissal and reversing the order overruling the motion to remand (Record 76-86). The opinion by Circuit Judge Collet held that Iowa law gave petitioner no right to appeal from the commissioners' award to the United States District Court, and for that reason, the judgment dismissing petitioner's action, as plaintiff, was proper. With respect to the case removed to the District Court, Judge Collet held that while the cases were not consolidated, the propriety of the order denying the motion to remand was properly before the court under the rule of *Deckert vs. Independence Shares Corp.*, 311 U.S. 282, 85 L.Ed. 189. The opinion then concludes that *Mason City & Fort Dodge R.R. Co. vs. Boynton*, 204 U.S. 570, 51 L. Ed. 629, 27 S. Ct. 321, is decisive of the issue of removability, since this court there said that a non-resident landowner was a defendant within the removal statutes. The opinion of the Court of Appeals is reported at 204 F.(2d) 116.

Petitioner by timely petition for rehearing pointed out

that the opinion of the court had ignored its contentions as set forth in its Briefs. The case of *Burford vs. Sun Oil Company*, 319 U.S. 315, not referred to in the original submission, was cited. On June 17, 1953, a majority of the Court of Appeals denied the petition for rehearing (Record 101-107). Judge Collet, speaking for the majority of the court, held that the filing of the complaint and service of summons could "not be treated as having created an original action in the Federal Court * * * since actions are not initiated in the Federal Courts by filing with a sheriff a request that he appoint commissioners to assess damages."

Thus, a majority of the court below apparently adopted the reasoning of Judge Riley that the proceeding might have been commenced in the first instance in the Federal Court; and, therefore, petitioner, could not, having filed its application with the sheriff, "switch to the Federal tribunal." Chief Judge Gardner dissented from the denial of the petition for rehearing. He pointed out that petitioner possessed all qualifications required of a plaintiff in an original action in the United States Court, and that the amount in controversy exceeded the jurisdictional amount fixed by Congress; that the proceeding before the County Sheriff was not of a judicial character, but after appeal to the courts, it was a civil action. The dissenting opinion concludes that the non-resident condemnor could not lawfully be denied access to the Federal tribunal.

The mandate of the Court of Appeals was stayed pending application to this Court for a writ of certiorari.

JURISDICTION.

1. The jurisdiction of this court to review the judgment and decision of the United States Court of Appeals for the Eighth Circuit is expressly provided for by the Federal Judiciary Act, Tit. 28, Sec. 1254, U.S.C.A. In one of the causes the action was commenced as an original action in the District Court, and the other cause was removed from the state court to the United States District Court, diversity of citizenship and jurisdictional amount being present. The jurisdiction of this court, therefore, is beyond question.

2. The date of the final judgment herein sought to be reviewed is June 17, 1953, on which date the opinion of the Court of Appeals for the Eighth Circuit was filed, denying petitioner's petition for rehearing.

THE QUESTIONS PRESENTED.

The questions presented may be summarized as follows:

1. Under state statutes of eminent domain providing for an administrative proceeding for the taking of real estate, and for an "appeal" to state courts from the award of damages, by either condemnor or landowner, is a non-resident condemnor, after serving the notice of appeal required by state law, precluded from instituting a civil action in an appropriate United States District Court where other jurisdictional requisites are present?

2. May a non-resident condemnor of real estate under state eminent domain statutes, which provide for an initial administrative proceeding before a county sheriff, institute such administrative proceedings in a United States District Court if diversity of citizenship and jurisdictional amount appear?

3. Does Rule 71-A, Federal Rules of Civil Procedure, permit an eminent domain proceeding to be initiated in an

appropriate United States District Court, or is such rule complied with by following applicable administrative procedure prescribed by state statute, and then instituting a civil action in the United States District Court, where diversity of citizenship and jurisdictional amount are present?

4. May a non-resident condemnor of real estate under state law which prescribes an "appeal" from an administrative award of damages to the state courts, and makes the condemnor a defendant in such action, remove such action from the state court to an appropriate United States District Court when other jurisdictional requisites are present?

5. Did the Court of Appeals correctly apply the provisions of Tit. 28, Sec. 1332, U.S.C.A. when it sustained the judgments of dismissal in the actions instituted by petitioner as plaintiff?

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

1. The Court of Appeals for the Eighth Circuit has decided an important question of Federal law of general interest in a manner having no support whatever in judicial precedent. The holding of the courts below that the administrative proceeding prescribed by state law constitutes a "civil action" is contrary to all prior decisions of the courts. The holding that petitioner could not, having exhausted its administrative remedy under state law, commence its action in an appropriate United States District Court denies to petitioner rights conferred by Tit. 28, Sec. 1332, U.S.C.A., which right is recognized by Rule 71-A, Federal Rules of Civil Procedure, promulgated by this court.

2. The Court of Appeals for the Eighth Circuit by its holding that petitioner may not, as plaintiff, institute a

civil action in an appropriate United States District Court, and may not, as defendant, remove a case appealed to and docketed in the state court, to the United States District Court, manifestly deprives a non-resident of rights specifically granted by Tit. 28, Secs. 1332 and 1441, et seq., U.S. C.A., which are recognized by Rule 71-A, Federal Rules of Civil Procedure. If petitioner be a plaintiff in the civil action contemplated by Iowa statutes, then it is entitled to institute the action prescribed by state law in the United States District Court. While, if petitioner be a defendant as designated by state statute, it is entitled to remove the action to the United States District Court.

3. The laws of Iowa like those of numerous other states; for example, Texas, Kansas, Kentucky and Minnesota, require that a condemnor of real estate acquire title to lands by an administrative proceeding, and then any party aggrieved may have a judicial review by a civil action in the courts. The holding of the Court of Appeals for the Eighth Circuit that a non-resident condemnor may not have access to the Federal courts for the determination of its liability to pay for lands taken presents a question of serious import and of general interest; and, in view of procedural uncertainties created by the decision of this court in *Mason City & Fort Dodge R.R. Co. vs. Boynton*, 204 U.S. 570, 51 L.Ed. 629, 27 S.Ct. 321, there is presented a question which should be determined by this court.

4. The Court of Appeals for the Eighth Circuit by its decision that a condemnor of real estate is not to be considered for removal purposes a defendant in the action, although specifically made so by state law, has misconstrued the decision of this court in *Mason City & Fort Dodge R.R. Co. vs. Boynton*, supra; and has thereby denied to petitioner the right to resort to a Federal tribunal in a diversity case.

5. The record presents a question of general interest as to the scope and proper application of Federal Rule 71-A in diversity cases involving the exercise of eminent domain powers by a non-resident of the state.

6. The Court of Appeals for the Eighth Circuit by its decision in this cause denying petitioner access to the Federal Courts to litigate the amount of its liability to citizens of the State of Iowa for the taking of their lands, has so far departed from the usual and accepted course of judicial precedent as to justify and require the intervention of this court in order that the manifest errors of law inhering in the opinion of the Court of Appeals be corrected.

A certified copy of the record in the causes in the United States Court of Appeals for the Eighth Circuit, including the record, proceedings, opinion and disposition of the cause had in said court, is herewith furnished and lodged in the office of the Clerk of this court in compliance with the rules of this court.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of, and under the seal of this court, directed to the United States Court of Appeals for the Eighth Circuit, commanding that court to certify and to send to this court, for its review and determination, a full and complete transcript of the record and all proceedings had in the cases numbered and entitled on the docket of said court as No. 14724, Chicago, Rock Island and Pacific Railroad Company, Appellant vs. Archie C. Stude, William Lumpkin and Pottawattamie County, Iowa, Appellees; No. 14725, Archie C. Stude, Cross-Appellant vs. Chicago, Rock Island and Pacific Railroad Company, Cross-Appellee; and No. 14726, Archie C. Stude and William Lumpkin, Appellants vs. Chicago, Rock Island and Pacific Railroad Company, Appellee, and that the opinion and judgment of the United States Court of Appeals for the

Eighth Circuit may be reversed by this court, and that petitioner have such other and further relief in the premises as to this court may seem meet and just.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

SUMMARY OF ARGUMENT.

I.

A. District Courts of the United States have original jurisdiction only in "civil actions" wherein diversity of citizenship is present and the controversy involves more than the jurisdictional amount of $3,000.

Tit. 28, Sec. 1332, U.S.C.A.

B. If state law provides for a judicial proceeding in its courts in eminent domain cases and other jurisdictional requisites are present, a non-resident condemnor may commence an action, in the first instance in the United States District Court. The rule is otherwise in those states in which state law provides for an administrative proceeding, followed by a "civil action", triable in the courts of the state. When state law provides for an administrative proceeding, it may not be instituted in the United States District Court until the administrative procedure has been followed, and the controversy has become a "civil action".

Mississippi & Rum River Boom Co. vs. Patterson, 98 U.S. 403, 25 L.Ed. 206.

Searl vs. School District, 124 U.S. 197, 31 L.Ed. 415.

Union Pacific R.R. Removal Cases, 115 U.S. 1, 29 L. Ed. 319.

Madisonville Traction Co. vs. St. Bernard Mining Co., 196 U.S. 239, 49 L.Ed. 462.

Myers vs. C&NW R.R. Co., 118 Iowa 312, 91 N.W. 1076.

Des Moines Water Co. vs. City of Des Moines, 206 Fed. 657, (C.A.8th).

Kaw Valley Drainage District vs. Metropolitan Water Co., 186 Fed. 315 (C.A.8th).

II.

A. After taking all steps required by state administrative procedure under Iowa law petitioner properly commenced its action in the United States District Court, if under Federal law, it be a plaintiff in such proceeding.

Burford et al vs. Sun Oil Co. et al, 319 U.S. 315, 87 L.Ed. 1424.
Texas Pipe Line vs. Ware, 15 F.2d 171, (C.A.8th).
Ellis vs. Associated Ins. Corp., 24 F.2d 809, (C.A. 5th).
Flowers vs. Aetna Casualty & Sureties Co., 154 F.2d 881 (C.A.6th).
Northern Pacific Railroad Co. vs. Babcock, 54 U.S. 190, 38 L.Ed. 958.
United States vs. 16,572 acres of land et al, 49 F. Supp. 555.

B. The right of a non-resident to resort to a Federal tribunal cannot be restricted, enlarged or diminshed by reason of state procedural statutes.

III.

A. If petitioner be not a plaintiff in the proceeding, it is necessarily a defendant as provided by state law and, as such, entitled to remove the case from the state court to the United States District Court.

B. The majority opinion of the Court of Appeals has improperly construed the opinion of this court in *Mason City & Fort Dodge R.R. Co. vs. Boynton.*

IV.

Petitioner's action in instituting the administrative proceeding before the Iowa sheriff complied with the requirements of Rule 71-A(k).

ARGUMENT.

I.

A.

District Courts of the United States have original jurisdiction in civil actions wherein diversity of citizenship is present and the controversy involves more than the jurisdictional amount of $3,000.

At the outset it is important that the court keep in mind the exact provisions of the statutes upon which petitioner relies. Tit. 28, Sec. 1332, U.S.C.A. provides as follows:

> "The district court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and is between:
>
> (1) Citizens of different states."

By the express provisions of this statute, only "civil actions" may be instituted in the United States District Courts. Purely administrative proceedings provided for by state law are not within the jurisdiction of the United States Courts. This is fundamental. It is clear, therefore, that unless the condemnation proceeding authorized by Iowa law was a civil action in its inception, petitioner could not have commenced its condemnation proceeding in an appropriate Federal court.

B.

If state law provides for a judicial proceeding in its courts in eminent domain cases, and other jurisdictional requisites are present, the non-resident condemnor may commence its action, in the first instance in the United States District Court. The rule is otherwise in those states in which

state law provides for an administrative proceeding, followed by a "civil action", triable in the courts of the state. When state law provides for an administrative proceeding, it may not be instituted in the United States District Court until the administrative procedure has been followed, and the controversy has become a "civil action."

A state may grant the sovereign power of eminent domain to governmental subdivisions, or to private corporations whose business serves the public interest. It may provide that such power shall be exercised in an administrative proceeding, or by a civil action in the courts of the state. If the state requires such powers be exercised in a court of the state, then the proceeding constitutes a "civil action" within the meaning of Tit. 28, Sec. 1332, U.S.C.A., and may be commenced in the Federal Court. This is the exact situation which was presented in *Madisonville Traction Co. vs. St. Bernard Mining Co.*, 196 U.S. 239, 49 L. Ed. 462. The Kentucky statutes there involved provided that condemnation proceedings should be instituted in a local court of inferior jurisdiction, and at all times be under the control and supervision of the judge of that court. Mr. Justice Harlan in speaking for this court took pains to point out that the condemnation proceeding provided for by Kentucky law was "a suit" or "controversy between citizens of different states" within the meaning of the Constitution and laws of the United States. He said:

> "It was, as already said, a judicial proceeding initiated in a tribunal which constitutes a part of the judicial establishment of Kentucky, as ordained by its Constitution; and the court, although charged with some duties of an administrative character, is a judicial tribunal and a court of record."

The cases of *Mississippi & Rum River Boom Co. vs. Patterson*, 98 U.S. 403, 25 L.Ed. 206 and *Searl vs. School District*, 124 U.S. 197, 31 L.Ed. 415, recognize that if state law provides for a judicial proceeding in eminent domain cases, then such proceeding is a "civil action" within the meaning of Federal statutes.

The state law of Illinois considered by the Court of Appeals for the Seventh Circuit in *Franzen vs. Chicago, Milwaukee and St. Paul Railroad Company*, 278 Fed. 370, likewise required that condemnation proceedings be commenced in a state court of record, and at all times be under the direction of judicial officers of the state. The Seventh Circuit Court of Appeals was careful to point out this salient requirement of state law in its opinion. Likewise, the Pennsylvania statutes considered in *Williams Livestock Company vs. D.L.&W. R.R. Co.*, 285 Fed. 795, provided for a judicial action in the Court of Common Pleas in condemnation cases, and all steps to be taken, including the appointment of "viewers," were under the control of the judge of that court. Judge Riley's opinion in the District Court in the case at bar cited these authorities in support of his statement that an action for taking real estate under power of eminent domain is a "civil action" and may always be brought in a Federal Court in diversity cases when the amount in controversy exceeds the jurisdictional minimum. This fundamental error seems to have pervaded the thinking of both the District Judge and the majority of the Court of Appeals, for Judge Collet points out that "civil actions in the U. S. District Courts are not initiated by a request to a sheriff that he appoint commissioners to assess damages." (Record 102).

The Eighth Circuit Court of Appeals has itself recognized that eminent domain proceedings may neither be commenced in, nor removed to, a U. S. District Court when

applicable state laws provide for an administrative proceeding before non-judicial officers. In the two cases of *Des Moines Water Company vs. City of Des Moines*, 206 Fed. 657, and *Kaw Valley Drainage District vs. Metropolitan Water Company*, 186 Fed. 315, efforts were made to remove administrative proceedings for condemnation of land direct to the United States Courts, before awards had been made by administrative officers. The same court which decided the case at bar, composed of different judges of course, held that the United States Courts were without jurisdiction "until the proceedings assume the character of a civil action." The opinion of the District Court considered, but, we believe, misapplied these precedents from the Eighth Circuit Court of Appeals; whereas, the opinion of the Appeals Court entirely ignored them, although cited in the Briefs of petitioner.

The Supreme Court of Iowa in *Chicago & Northwestern Railway Company vs. Myers*, 118 Iowa 312, 91 N.W. 1076, likewise held that the proceeding before the sheriff was merely "in the nature of an inquest", not judicial in character, and could not have been instituted in the first instance in a District Court of the United States. The Court of Appeals first said that it was unnecessary to decide the question here under consideration, and in overruling the petition for rehearing reiterated the statement. In this respect we submit the Appeals Court was in error, for if the action before the sheriff was administrative in character, as everyone agrees it was, then petitioner did not institute a judicial proceeding when it requested the sheriff to appoint commissioners to assess damages. The proceeding prescribed by Iowa law has none of the requisites of a "civil action" until it is appealed to the courts.

II.

A.

After taking all steps required by state administrative procedure under Iowa law petitioner properly commenced its action in the United States District Court, if under Federal law, it be a plaintiff in such proceeding.

We have heretofore pointed out that Iowa statutes provide that upon appeal from the award of sheriff's commissioners condemnor is the defendant and the landowner the plaintiff. This court in *Mason City & Fort Dodge R.R. Co. vs. Boynton*, 204 U.S. 570, 51 L.Ed. 628, held that the Federal courts must disregard the designation of the parties applied by state law and decide the question for themselves, based on the proper character of the parties, and that a non-resident landowner whose property was being appropriated by a resident railroad corporation was a defendant in the appeal and could remove the action from an Iowa court to the United States District Court.

A non-resident condemnor who finds it necessary to institute the action provided by Iowa law is either a plaintiff or a defendant. If condemnor be a plaintiff, then certainly he cannot properly be denied access to the Federal Court if he commences his action therein at the earliest possible time. The record discloses that petitioner came to the Federal court when the administrative procedure was concluded. The majority of the Court of Appeals held that petitioner did not properly invoke Federal jurisdiction because it served upon the landowners and the sheriff a notice of appeal required by state law advising them that the appeal would be docketed in the United States District Court, on or before a day certain. The notice of appeal was required by state law to convert the administrative proceeding into a judicial action in the courts. Had peti-

tioner served no notice of appeal, then under state law the award of sheriff's commissioners was an absolute finality. A majority of the Court of Appeals also said that petitioner had strictly followed the Iowa procedure for instituting a condemnation suit in the Iowa courts; that "the complaint filed in the United States District Court after the appeal was lodged there was required by the Iowa statute, and a similar complaint was filed in the Iowa District Court after the appeal to that Court."

This statement of the majority opinion is erroneous. Under Iowa law a condemnor does not file any complaint in the state court. This is done by the landowner, the plaintiff. The complaints filed in the cases appealed to the state court were filed by the landowners (Record 49-55) and not by this petitioner. Equally erroneous is the conclusion of the majority that the complaint filed in the United States District Court "cannot be treated as having created an original action in the Federal Court." We must confess that we cannot understand this statement of the majority opinion. We have always understood that a suit was commenced in a United States District Court by filing a complaint. Rule 3, Federal Rules of Civil Procedure so states. Indeed, petitioner certainly could not, under the Rules, have taken any steps to commence an original action in the Federal Court except by filing a complaint.

It is true that the complaint contained allegations concerning the prior administrative action before the sheriff, not before the state court. These were included to show that the hearing before commissioners referred to in Rule 71-A had already been had. Furthermore, counsel for petitioner requested that a summons be issued and caused it to be served by the Marshal (Record 9). If the action in the Federal Court had been instituted by serving the notice of appeal on the sheriff and landowners, this step would have been quite unnecessary. What petitioner did was sim-

ply to follow Iowa law through the steps necessary to convert the administrative proceeding into a suit, or a "civil action"; then immediately took all proper jurisdictional steps for the commencement of its civil action in the proper United States District Court.

Much confusion seems to have arisen in the minds of the judges of the two courts below because of the provision of the Iowa statutes providing for an "appeal" from the administrative award to the state court. Had the Iowa law provided for the administrative proceeding before the sheriff, and then stated that any party might commence an action before any court of competent jurisdiction, where the case should be tried anew by ordinary proceedings, no difficulty would have arisen.

It seems to be well settled by the decisions of this and various Courts of Appeal that if state statutes create rights, provide for their determination in administrative proceedings and a review by a suit in state courts, the judicial review action may be commenced in a Federal Court if diversity of citizenship and jurisdictional amount appear.

Thus, in *Associated Industries Assurance Corp. vs. Ellis*, 16 F.(2d) 464, affirmed by the Fifth Circuit Court of Appeals in 24 F.(2d) 809, it was held that a civil action to review an administrative award of Workmen's Compensation was properly brought in a Federal Court, although state law provided only for state court action. The Eighth Circuit Court of Appeals in *Texas Pipe Line Co. vs. Ware*, 15 F. (2d) 171, followed the same rule with respect to the Louisiana Workmen's Compensation Act, which is, by state law administered in a civil action brought in state courts. The Court of Appeals for the Eighth Circuit held that the suit provided by state law was a "civil action" and might be instituted in either state or Federal Courts in a diversity case. Judge Kenyon speaking for the Eighth Circuit Court

quoted from the decision of this court in *Davis vs. Gray*, 16 Wall. 203, 221, 21 L.Ed. 447:

> "A party by going into a national court does not lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality."

If there be any question about the right of petitioner to invoke the original jurisdiction of the Federal Court, although state law provides only for an appeal to a state court, it has been decided by this court in the recent case of *Burford vs. Sun Oil Co. et al*, 319 U.S. 315, 87 L.Ed. 1424. In that case it appeared that Texas had adopted a rationing program regulating the drilling of new oil wells within the state. The statute provided for an administrative proceeding before the state Railroad Commission, with an appeal therefrom to a state equity court. Burford applied to the Commission for a permit to drill wells and was granted such authority. Sun Oil Company instituted an equity action to set aside the permit and order of the Commission in the United States District Court, which declined to take jurisdiction. The Fifth Circuit Court of Appeals reversed the judgment of dismissal. This court granted certiorari, and in the opinion of the majority written by Mr. Justice Black, jurisdiction of the District Court was sustained, although the majority held that because of the nature of the case, the District Court should have declined to take original jurisdiction and the parties should have been remitted to state courts because of possible conflict between state and Federal authority. This Court there said:

> "Jurisdiction of the federal court was invoked because of the diversity of citizenship of the parties, and because of the Companies' contention that the order denied them due process of law. There is some argument that the action is an 'appeal' from the State Commission to the federal court, since an appeal to a state court

can be taken under relevant Texas statutes; but, of course, the Texas legislature may not make a federal district court, a court of original jurisdiction, into an appellate tribunal or otherwise expand its jurisdiction, and the Circuit Court of Appeals in its decision correctly viewed this as a simple proceeding in equity to enjoin the enforcement of the Commission's order."

From the foregoing it seems to us very clear that (1) petitioner's administrative proceeding under state law was not a "civil action" within the meaning of Tit. 28, Sec. 1332, U.S.C.A., and could not be brought initially in Federal Court, and (2) petitioner's civil action was commenced in the Federal Court at the earliest permissible time. The only remaining question is whether under the law petitioner was a proper plaintiff in the action. Whether petitioner is plaintiff or defendant must, of course, be determined by Federal law since state statutes cannot control suits in national courts.

We believe that condemnor under the circumstances here shown was properly designated a plaintiff in the "civil action" commenced in the United States District Court for Southern Iowa. If the whole condemnation proceeding be viewed in its entirety, it is quite clear that petitioner is a plaintiff in the proceeding.

This court pointed out in *Mason City & Fort Dodge R.R. Co. vs. Boynton*, 204 U.S. 570, 51 L.Ed. 629, 27 S.Ct. 321, that the whole proceeding was instituted for the purpose of acquiring land against the will of the owner; that condemnor instituted the proceeding and that the necessity of the railroad company to acquire title "is the main spring of the proceedings from beginning to end, and the persistence of that intention is the condition of their effect."

If the so-called "appeal" from the administrative award be considered as a lawsuit, separate and apart from the initial proceedings before the sheriff's commissioners, peti-

tioner is still plaintiff in the action. While the landowner filed answer to the petitioner's complaint and a counterclaim in which he seeks an increase in the amount of damages awarded, petitioner is still the active party who initiated the proceeding, and who seeks affirmative relief from an excessive and unjust award of damages returned in the administrative proceeding. Petitioner in effect seeks to set aside the award and to substitute therefor one which it believes more equitable and just. It seems clear, therefore, that viewed in any light, petitioner was properly designated as plaintiff and properly invoked the original jurisdiction of the United States District Court.

III.

A.

If petitioner be not a plaintiff in the proceeding, it is necessarily a defendant as provided by state law and, as such, entitled to remove the case from the state court to the United States District Court.

If petitioner was not a proper party plaintiff to institute a civil action invoking the original jurisdiction of the Federal Court, we believe it necessarily follows that it was a defendant as provided by state law. If petitioner be a defendant, then it is clear that under the provisions of Tit. 28, Sec. 1441, U.S.C.A. it was entitled to remove the case from the state court.

Judge Riley held that petitioner was a defendant in the action, since the land had been acquired in the administrative proceeding, and possession had been secured under state law by depositing the amount of the award with the County Sheriff; leaving only the issue of damages, to which the landowner and his tenant were entitled, for trial in the civil action on appeal. In the removal cases the landowners

filed their petitions as required by state law and thereby raised only the issue of the amount of damages to which they were entitled. Judge Riley said that for all essential purposes petitioner was both a "nominal and an actual defendant". It is certainly true that petitioner is in the position of defending against claims made against it for the taking of respondents' lands.

If the whole process of eminent domain provided by Iowa law be considered as two proceedings, one administrative in character before the sheriff and the other judicial in nature before the courts, petitioner has all the attributes of a defendant in the lawsuit. While it seems to us that the better view is that petitioner was a plaintiff, and therefore properly instituted an original action in the United States District Court, if we are in error in this respect, it necessarily follows that the removal cases properly invoked the jurisdiction of the Federal Courts and that the Court of Appeals erred in holding that petitioner could be neither plaintiff nor defendant in the District Court of the United States.

B.

The majority opinion of the Court of Appeals has improperly construed the opinion of this court in Mason City & Fort Dodge R. R. Co. vs. Boynton.

A majority of the Court of Appeals held that the decision of this court in *Mason City & Fort Dodge R.R. Co. vs. Boynton*, 204 U.S. 570, 51 L.Ed. 629, required a reversal of the ruling of the trial court upon the landowners' motion to remand. While petitioner consented that the Court of Appeals might consider the appeal of the landowners from this ruling, we are of the opinion that the matter was not properly before the court below. Petitioner appealed from a judgment of dismissal in the case in which it was plain-

tiff. The landowners attempted to appeal from an order overruling a motion to remand in a case separately docketed, which was not consolidated in any manner with petitioner's first suit. Under these circumstances, we do not believe that the rule of *Deckert vs. Independence Shares Corp.*, 311 U.S. 282, 85 L.Ed. 189, governs so as to justify consideration of a non-appealable order. It has never been held by any court to our knowledge that a proper appeal in one case brings before the court the record in a wholly separate non-consolidated case, so as to justify review of a non-appealable order by a Court of Appeals.

We believe that the Court of Appeals was in error in holding that the *Boynton* case was decisive of the case at bar. In the *Boynton* case a resident railroad corporation of Iowa instituted a condemnation proceeding against a non-resident for the taking of certain lots in the City of Carroll, Iowa. A small award was made in the administrative proceeding and the landowner appealed to the state district court and caused the case to be there docketed; then filed a petition for removal to the United States District Court, where the case was tried, and a judgment entered fixing the landowner's damages at a much higher figure than the amount awarded by sheriff's commissioners. The railroad appealed to the Court of Appeals and there contended that, although it had filed no motion to remand, the landowner had improperly removed the case, and the District Court was without jurisdiction. The Court of Appeals for the Eighth Circuit certified to this court four questions which it desired this court to answer, This court in an opinion written by Mr. Justice Holmes and characteristically short, answered in the affirmative only the first question certified; namely, "Was the landowner a defendant within the removal statutes?"

Mr. Justice Holmes pointed out that the Iowa Supreme Court in *Myers vs. C&NW R.R. Co.*, 118 Iowa 312, 91 N.W.

1076, had held that under Iowa law a non-resident corporation was the defendant in an appeal from an administrative condemnation award and had a right to remove the case to a Federal court. Mr. Justice Holmes then said that the decision of the Iowa Supreme Court was not binding on Federal Courts as to a question of Federal law and that:

> "In condemnation proceedings the words 'plaintiff' and 'defendant' can be used only in an uncommon and liberal sense. The plaintiff complains of nothing. The defendant denies no past or threatened wrong. Both parties are actors: one to acquire title, the other to get as large pay as he can. It is not necessary, in order to decide that the present removal was right, to say that the state decision was wrong. We leave the latter question where we find it."

It is apparent, therefore, that all that was decided in the *Boynton* case was that a landowner was a defendant so as to be entitled to remove a case arising under the Iowa statutes to a Federal court. Mr. Justice Holmes' opinion does not intimate whether the dual character of the actors prevents a condemnor in possession from being a defendant with respect to damages. Ordinarily it is true that two contending parties cannot be defendants in a lawsuit. If the condemnation proceeding be viewed in its entirety, and from its inception as one proceeding, we concede that a condemnor has more resemblance to the traditional concept of a plaintiff than of a defendant. But if the status and positions of the parties in the civil action before the courts be considered, apart from the prior administrative proceedings, then the position of a condemnor is more nearly that of a defendant than a plaintiff.

An analysis of Mr. Justice Holmes' opinion does not support the conclusion of the Court of Appeals that it is absolutely decisive of the question presented by this record.

We believe that a majority of the Court of Appeals gave to the *Boynton* case undue weight.

The fact remains that in the civil action before the courts contemplated by the Iowa statutes, petitioner must be either a plaintiff or a defendant. If petitioner's status was that of a plaintiff as the *Boynton* case suggests, then petitioner properly invoked the original jurisdiction of this court; and the Court of Appeals' decision is erroneous. If petitioner's position in the litigation be that of a defendant, then it was entitled to invoke Federal jurisdiction by removal of the case from the state court; and the majority of the Court of Appeals was wrong. Petitioner attempted to preserve all rights to which it was entitled by invoking Federal jurisdiction, both by filing an original action and by following state law, then removing the case to the United States District Court. We believe that it was clearly entitled to have the cases tried in the United States District Court. The amount of the awards returned by the sheriff's commissioners in the administrative proceeding demonstrates that local prejudice must have been a potent factor influencing the size of the awards of damages.

IV.

Petitioner's action in instituting the administrative proceeding before the Iowa sheriff complied with the requirements of Rule 71-A(k).

Rule 71-A governing the procedure in the Federal courts in eminent domain cases arising under both Federal and state laws took effect on August 1, 1951. Subdivision (k) of this rule states:

> "The practice as herein prescribed governs in actions involving the exercise of the power of eminent domain under the law of a state, provided that if the state law makes provision for trial of any issue by jury, or for

trial of the issue of compensation by jury or commission or both, that provision shall be followed."

Our examination of the authorities has revealed no cases construing Rule 71-A from the Federal courts involving condemnation proceedings under state law.

It is, of course, quite fundamental (although the contrary was contended for by counsel below) that Rule 71-A is a mere procedural rule. None of the Federal Rules of Civil Procedure effects either jurisdiction or venue of District Courts of the United States (See Rule 82, Federal Rules of Civil Procedure). It is plain, therefore, that the jurisdiction of the United States District Court was in no way enlarged by Rule 71-A.

We have heretofore pointed out that a Federal Court could not have entertained an administrative proceeding provided for by state law. Since Rule 71-A does not enlarge the jurisdiction of the District Courts, and since the rule requires that state law with respect to proceedings before a commission shall be followed, the only action which petitioner could have taken to comply with Rule 71-A(k) was to proceed as it did. No other course was open to petitioner.

CONCLUSION.

All agree that this cause presents a controversy wholly between citizens of different states in which more than $3,000 is involved. Everyone agrees that the suit contemplated by the Iowa statutes is a civil action. Under these circumstances, it is manifest that the non-resident condemnor, if it be the plaintiff in the action, had a right to institute the action in a District Court of the United States. If condemnor be not a plaintiff but a defendant in the action, then it is equally plain that it is, by virtue of the removal statutes, entitled to have the case litigated in a Federal tribunal rather than in courts of the state.

The reported cases disclose that for a period of fifty years there has been uncertainty and doubt as to the proper procedure to be followed by a non-resident condemnor of land in Iowa, and the uncertainties were not dispelled by the decision of this court in *Mason City & Fort Dodge R.R. Co. vs. Boynton*. They have been multiplied by the decisions of the Court of Appeals in the case at bar. Because of those uncertainties, petitioner in this case invoked the jurisdiction of the United States District Court at the earliest possible time, by filing an original action and also by proceeding under state law to appeal the case to the state court, and remove it to the Federal Court for trial. The Court of Appeals has held that a non-resident condemnor of Iowa real estate may not have access to the Federal Courts. We believe that this decision denies to petitioner fundamental rights guaranteed by the statutes of the United States.

We submit that the perplexing question should be decided by this court; that this case is one calling for the exercise by this court of its supervisory powers over the judgments and decrees of Courts of Appeal. In order that the manifest errors committed by the Court of Appeals for the Eighth Circuit may be corrected, and petitioner may have the benefit of the rights to which it is entitled under the statutes of the United States, a writ of certiorari should be granted. This court should review the decision of the Eighth Circuit Court of Appeals and reverse it.

Respectfully submitted,

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APPENDIX.

(All section references are to the Code of Iowa, 1950.)

Section 471.6. Railways. Any railway, incorporated under the laws of the United States or of any state thereof, may acquire by condemnation or otherwise so much real estate as may be necessary for the location, construction, and convenient use of its railway. * * *

Section 472.3. Application for condemnation. Such proceedings shall be instituted by a written application filed with the sheriff of the county in which the land sought to be condemned is located. Said application shall set forth: * * *

Section 472.4. Commission to assess damages. The sheriff shall thereupon, except as otherwise provided, appoint six resident freeholders of his county, none of whom shall be interested in the same or a like question, who shall constitute a commission to assess the damages to all real estate desired by the applicant and located in the county.

Section 472.8. Notice of assessment. The applicant, or the owner or any lienholder or encumbrancer of any land described in the application, may, at any time after the appointment of the commissioners, have the damages to the lands of any such owner assessed by giving the other party, if a resident of this state, ten days notice, in writing. Such notice shall specify the day and the hour when the commissioners will view the premises, and be served in the same manner as original notices.

Section 472.14. Appraisement—report. The Commissioners shall, at the time fixed in the aforesaid notices, view, if necessary, the land sought to be condemned and assess the damages which the owner will sustain by reason of the appropriation, and file their written report with the

sheriff. The appraisement and return may be in parcels larger than forty acres belonging to one person and lying in one tract, unless the agent or attorney for the applicant, or the commissioners, have actual knowledge that the tract does not belong wholly to the person in whose name it appears of record. In case of such knowledge the appraisement shall be made of the different portions, as they are known to be owned.

Section 472.17. When appraisement final. The appraisement of damages returned by the commissioners shall be final unless appealed from.

Section 472.18. Appeal. Any party interested may, within thirty days after the assessment is made, appeal therefrom to the district court, by giving the adverse party, his agent or attorney, and the sheriff, written notice that such appeal has been taken.

Section 472.21. Appeals—how docketed and tried. The appeal shall be docketed in the name of the owner of the land, or of the party otherwise interested and appealing, as plaintiff, and in the name of the applicant for condemnation as defendant, and be tried as in an action by ordinary proceedings.

Section 472.22. Pleadings on appeal. A written petition shall be filed by the plaintiff on or before the first day of the term to which the appeal is taken, stating specifically the items of damage and the amount thereof. The defendant shall file a written answer to plaintiff's petition, or such other pleadings as may be proper.

Section 472.23. Question determined. On the trial of the appeal, no judgment shall be rendered except for costs, but the amount of damages shall be ascertained and entered of record.

Section 472.25. Right to take possession of lands. Upon the filing of the commissioners' report with the sheriff,

the applicant may deposit with the sheriff the amount assessed in favor of a claimant, and thereupon the applicant shall, except otherwise provided, have the right to take possession of the land condemned and proceed with the improvement. No appeal from said assessment shall affect such right, except as otherwise provided.

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IN THE

Supreme Court of the United States

October Term, A.D. 1953.

No. 306

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Petitioner*,

vs.

ARCHIE C. STONE, WILLIAM JUMPER and FOTTA WATERBIE COUNTY, IOWA, *Respondents*.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Petitioner*,

vs.

ARCHIE C. STONE, *Respondent*.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Petitioner*,

vs.

ARCHIE C. STONE and WILLIAM JUMPER, *Respondents*.

PETITIONER'S REPLY TO RESPONDENTS' BRIEF ON PETITION FOR CERTIORARI

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IN THE

Supreme Court of the United States

October Term. A.D., 1953.

No. 209.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Petitioner*,

vs.

ARCHIE C. STUDE, WILLIAM LUMPKIN and POTTAWATTAMIE COUNTY, IOWA, *Respondents*.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Petitioner*,

vs.

ARCHIE C. STUDE, *Respondent*.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Petitioner*,

vs.

ARCHIE C. STUDE and WILLIAM LUMPKIN, *Respondents*.

PETITIONER'S REPLY TO RESPONDENTS' BRIEF ON PETITION FOR CERTIORARI.

FOREWORD.

A reading of respondents' brief, we believe, demonstrates beyond question that the judgment of the Court of Appeals can be sustained only if, as respondents contend, petitioner might have initiated its condemnation proceeding in the first instance in the United States District Court. The question posed by respondents' brief, boldly stated, is simply this: In a diversity case may a United States District Court entertain jurisdiction in a purely administrative proceeding prescribed by state law, because the law of the state also pre-

scribes a judicial review of the administrative decision when completed?

To ask the question is, of course, to answer it. We submit that upon no other legally tenable theory can the judgments of the courts below be upheld.

SUMMARY OF ARGUMENT.

I.

Petitioner manifestly could not institute the purely administrative proceeding prescribed by Iowa condemnation statutes in the United States District Court. The jurisdiction of the District Court is limited to "civil actions".

Tit. 28, Sec. 1332, U.S.C.A.

Kaw Valley Drainage District vs. Metropolitan Water Co., 186 Fed. 315.

A. The authorities cited by respondents do not support their contention that petitioner was authorized to commence its administrative condemnation proceeding before the United States District Court.

II.

Rule 71 A, Federal Rules Civil Procedure, does not enlarge the jurisdiction of the United States District Court. It is a mere procedural rule governing cases properly within the jurisdiction of the District Courts.

Federal Rules of Civil Procedure, Rule 82.

III.

The decision of the court below is contrary to every previous decision of this court and of the Court of Appeals for the Eighth Circuit itself.

Madisonville Traction Co. vs. St. Bernard Mining

Co., 196 U. S. 239, 49 L. ed. 462.
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IV.

Petitioner's procedure substantially complied with the requirements laid down by Rule 71 A.

ARGUMENT.

I.

Petitioner manifestly could not institute the purely administrative proceeding prescribed by Iowa condemnation statutes in the United States District Court. The jurisdiction of the district court is limited to "civil actions".

Respondents urge that petitioner had its choice "of commencing the action (condemnation proceeding) in the state or Federal courts"; and that, having elected to initiate the condemnation action before the County Sheriff, petitioner necessarily lost its right to resort to the Federal courts. They urge that petitioner's right to condemn was granted by Chapter 471, Iowa Code 1950, whereas, the *procedure under eminent domain* is prescribed by Chapter 472. They urge (and the district court so held) that the condemnation proceeding before the sheriff could have been instituted *in the first instance* before the United States District Court "under Rule 71A". In support of this contention the case of *Franzen vs. Chicago, Milwaukee & St. Paul Ry. Co.*, 278 Fed. 370 (C.A.7) and a number of other cases involving

condemnation of lands by the United States under Federal statutes are cited.

We may concede that if petitioner had a right to commence its condemnation action initially in the United States District Court, and chose instead to go before the Sheriff of Pottawattamie County, Iowa, it cannot now retrace its steps; but it is too plain for argument that the United States District Court cannot entertain a purely administrative proceeding prescribed by state statute. The Court of Appeals for the Seventh Circuit pointed out in the *Franzen* case, supra, that under the state law involved the condemnation proceeding was a judicial action from its inception; that the proceeding was, by state statute, initiated in a court of record, and was at all times under the control of judicial officers.

The Eighth Circuit Court of Appeals itself in *Kaw Valley Drainage District vs. Metropolitan Water Co.*, 186 Fed. 315 said:

> "While it is true that the state may not deprive the federal court of its jurisdiction to determine matters of a judicial nature which are within the federal judiciary act, it by no means follows that, in all instances, the proceedings to take private property for public use, which are prescribed by the sovereign power of the state, must be from the inception judicial." * * *
>
> "The several decisions of the Supreme Court, relating to this subject, are in perfect harmony, to the effect that the power of eminent domain may be exercised by the state in such mode as it sees fit. It may be by administrative inquest, if provision is made permitting a determination of the amount of damages by a civil action at some period before the proceedings become final, or the proceeding may be by civil action at the outset. If the former, the federal courts are without jurisdiction until the proceedings assume the character of a civil action, when, by the latter mode, federal courts

> may have jurisdiction from the inception of the proceeding, if the requisite diversity of citizenship and amount in controversy exist."

Here the Iowa statutes prescribe an administrative proceeding before the County Sheriff; and the proceeding becomes judicial in character (the subject of a "civil action") only when the case is brought before the courts for determination.

The cases cited on Page 7 of respondents' brief do not support their contentions. Except for the *Franzen* case, already distinguished, they involve condemnation proceedings authorized by Federal statutes under the original Conformity Act, now superseded by Rule 71A, Federal Rules of Civil Procedure. Thus, in *Central Neb. Public Power & Irr. Dist. vs. Harrison*, 127 F. 2d 588, a condemnation proceeding was instituted under the Federal Power Act, 16 USCA 791A, et seq., which granted to the Power District the right of eminent domain to be exercised in the United States Court and provided that the procedure should conform as nearly as may be to that in similar actions or proceedings under the law of the state where the property was situated. The Eighth Circuit Court of Appeals said:

> "As the lands involved are in Nebraska, the condemnation proceedings were had in a Federal court in that state; but the law and procedure of the state were controlling."

The principal question there involved was whether in the condemnation proceeding an option executed by the record owner of the land sought to be condemned was admissible in evidence. The case arose under the Conformity Act, no longer in effect, and is clearly not comparable with the case at bar.

In *United States vs. Dillman*, 146 Fed. 2d 572, the United States sought to condemn lands for an ordnance plant under

a Federal statute prescribing conformity with Texas law. The court reversed an award of damages made by the District Judge sitting without a jury because the findings of fact revealed that while making an inspection of the premises, the Judge was accompanied by a police sergeant who gave him information concerning various tracts. The case is without value here.

United States vs. Federal Land Bank of St. Paul, 127 Fed. 2d 505, involved the taking of lands located in the State of Minnesota by the United States in conformity with Minnesota statutes. The United States failed to serve separate notices of appeal upon different landowners, and the district court dismissed the government's appeal. The Court of Appeals for the Eighth Circuit affirmed. The case has no bearing on the jurisdictional issue before the court.

The case of *United States vs.* 16,572 *acres of land*, 49 F. Supp. 555, from the United States District Court for the Southern District of Texas is more closely in point than any of the others cited. That was a condemnation action instituted by the United States to acquire lands for a bombing field in wartime. Under the Conformity Act, then in force, the Texas procedural law was to be followed. The Texas statutes required that condemnation proceedings be instituted by the appointment of commissioners by a County Judge (not a judicial officer). If any party interested filed objections to the awards made by the commissioners, the case was docketed in the County Court; the adverse party was to be cited in by process, and the case tried before a judge and jury. District Judge Kennerly in the course of the opinion pointed out that under Texas law there was a clear distinction between a condemnation action and a "suit in the state court".

We have been unable to find the case of *United States vs. 18,236 acres of land in Franklin County, Pennsylvania*, 6 F. Supp. 665. The citation is erroneous.

In *United States vs. 1010.8 acres of land in Sussex County, Delaware*, 77 Supp. 529, the United States under Federal statutes instituted condemnation proceedings in conformity with Delaware statutes. The question presented was which of the particular Delaware condemnation statutes should be applied. No question of the character here involved was considered by the court.

Of similar import are the cases reported at 43 F. Supp. 937 and 43 F. Supp. 633 which involve condemnation under Federal statutes by the United States, the procedure being in conformity with the laws of the state.

It is urged by respondents that Iowa procedural statutes cannot effect the manner of commencing actions in the Federal court. This we readily concede. But respondents ignore the fact that, in determining whether a proceeding prescribed by state law constitutes a civil action, consideration must be given to the character of the proceeding, the officers of the state before whom it is conducted, and the inherent nature of the proceeding itself. Here state law granted to petitioner the right to take respondents' lands, but prescribed a purely administrative procedure to be followed; not a civil action.

The Federal courts here must follow and apply the laws of Iowa. The Federal statutes granted petitioner no right to condemn respondents' lands. Iowa law granted petitioner such right, but required that it be exercised first in a purely administrative proceeding. The United States District Courts have no power to convert an administrative proceeding prescribed by state law into a "civil action", cognizable in the Federal courts, merely because, had state law prescribed a judicial action, the case might properly have been instituted in the Federal tribunal.

II.

Rule 71A, Federal Rules of Civil Procedure, does not enlarge the jurisdiction of the United States District Court. It is a mere procedural rule governing procedural matters in cases properly within the jurisdiction of the District Court.

It is urged by respondents that petitioner "did not attempt to invoke the original jurisdiction of the Federal Court under Rule 71A", and that its complaint was therefore properly dismissed. Throughout respondents' brief the thought is reiterated that Rule 71A, in some undisclosed manner, enlarged petitioner's rights or broadened the jurisdiction of the district court. This is clearly fallacious. It must be remembered that Rule 71A is a mere procedural rule prescribed by this court. This court possesses no power to increase, diminish, or enlarge the jurisdiction of the district courts of the United States. Power to change the jurisdiction of the district courts is left solely to Congress. Furthermore, the Rules of Civil Procedure themselves specifically provide nothing therein contained shall affect either jurisdiction or venue. Rule 82, Rules of Civil Procedure.

III.

The decision of the court below is contrary to every previous decision of this court, and of the Court of Appeals for the Eighth Circuit itself.

Under Division II of their brief at pages 21 to 26, respondents urge that the decision of the Eighth Circuit Court of Appeals is in harmony with prior decisions of this court and those rendered in other circuits. They invoke the elementary rule that petitioner's complaint was required to show jurisdiction in the Federal court. They cite *Norton vs. Larney*, 266 U.S. 511, 69 L.Ed. 413, which was an action to

quiet title to a tract of land in Oklahoma originally allotted to a Creek Indian. This court in an opinion by Mr. Justice Sutherland there held that jurisdiction of a Federal court must affirmatively and distinctly appear from the allegations of the complaint, but that, where the pleadings disclosed that the title of one litigant depended upon the construction of an act of Congress, the jurisdiction of the court sufficiently appeared. *Young vs. Main*, 72 F. 2d 264, was an Eighth Circuit case in which the complaint alleged rescission of a contract obtained by fraud wherein plaintiff had paid $2,891 for certain machines. The complaint also prayed for recovery of damages for conspiracy or deceit in excess of $3,000. The court held that there could be no right to recover damages for deceit where the contract had been rescinded and that, since the complaint showed on its face that the $2,891 was the most plaintiff could recover, the requisite jurisdictional amount was not shown. *Ward vs. Morrow*, 15 F. 2d 660, is another Eighth Circuit decision holding merely that allegations as to residence of the parties were insufficient to show diversity of citizenship. The case of *Williams Livestock Company vs. Delaware L. & W. R. Co.*, 285 Fed. 795, from the United States District Court in Pennsylvania points out that under Pennsylvania law a railroad company seeking to condemn land was required to institute a judicial proceeding in the Pennsylvania Court of Common Pleas. The District Court there held that such action prescribed by state law was a "civil action", within the meaning of the Federal statutes, and was, therefore, properly brought in a Federal tribunal.

Respondents point out that in the *Williams* and *Franzen* cases state law required the appointment of appraisers, or viewers, as a preliminary step in condemnation proceedings, and that in each case it was held that the viewers or appraisers might be appointed by the Judge of the United States District Court. The contention seems to be that since

viewers or appraisers may be appointed by the United States District Judge in a judicial action, the United States District Judge, or United States Marshal, could properly have appointed commissioners to assess damages in conformity with Iowa law and as prescribed by Rule 71A. Counsel entirely overlook the fact that the statutes of Illinois and Pennsylvania involved in the *Prentice* and *Williams* cases provided for a judicial proceeding in the state courts in condemnation cases. Iowa law provides for an administrative proceeding.

Under the Conformity Act, prior to the adoption of Rule 71A, the district courts proceeded in accordance with the procedure prescribed by state law. A United States District Court in Iowa vested with the jurisdiction to entertain domain cases under Federal control under the Conformity Act would doubtless have appointed all appraisers required by state law. The Conformity Act no longer governs procedural matters in the Federal courts in condemnation proceedings, for Rule 71A has occupied the field. To the extent that Rule 71A requires procedural matters to coincide with the requirements of state law, the district judge may make all necessary appointments in cases properly within the jurisdiction of the United States District Courts. But Rule 71A has not modified or enlarged the jurisdiction of the District Courts of the United States.

Counsel for respondents attempt to distinguish the case of *Stafford vs. Sun Oil Co., et al.* 319 U.S. 345, 87 L.Ed. 1434, from the case at bar, because plaintiff there sought to completely set aside the order of a state administrative tribunal, whereas, it is said that the case at bar "is an appeal from an award, and does not attempt to set aside the award". It is plain that in the *Sun Oil* case a state administrative proceeding was conducted before an administrative tribunal as required by state law. State law provided for an "appeal" to a state court. But plaintiff, a non-resident of the state, in-

stituted his action in the Federal court to set aside the administrative order although state law authorized only an "appeal" to a state court. In the case at bar petitioner in conformity with state law instituted its administrative proceeding. It was necessary that a "notice of appeal" be served on the sheriff and the opposing landowners to prevent the administrative award from becoming a finality; so petitioner served the notice of appeal, then instituted its action in the United States District Court. It is apparent that counsel's attempt to differentiate the cases has no substance.

The Texas statutes involved in the *Sun Oil* case provided for a judicial review of an administrative decision, just as do the Iowa statutes in the case at bar. Since petitioner is seeking the judicial review it is by Federal law a plaintiff, although named by state statute a defendant. Petitioner properly invoked Federal jurisdiction at the earliest possible time, and as a plaintiff is entitled to maintain its civil action in the United States District Court.

CONCLUSION.

By the laws of Iowa everyone concedes that the "appeal" from the award of condemnation commissioners is a civil action, and a judicial proceeding triable as an ordinary suit at law. The Federal statutes grant to the District Courts of the United States jurisdiction over "civil actions" in cases wherein more than three thousand dollars, exclusive of interest and costs, is involved, if the controversy be wholly between citizens of different states. The statutes of the United States make no exceptions of civil actions involving eminent domain proceedings under state law. To sustain the decision of the Court of Appeals requires engrafting upon Title 28, Sec. 1332 and 1441 the words "except in civil actions involving the exercise of the power of eminent domain by a non-resident of the state." We submit that the

plain language of the statute permits no such exception.

We think it plain that petitioner is, under Federal law, either a plaintiff or defendant in an Iowa eminent domain case after administrative procedures have been completed. If petitioner be a plaintiff, then it properly invoked the jurisdiction of the District Court. If petitioner be a defendant, then it properly invoked the jurisdiction of the District Court by removal.

Contrary to the contentions of respondent, the questions presented by this record are of great importance to pipe line companies, transmission and power line companies, railroads, and other foreign corporations operating within the State of Iowa. Because of the similarity of Iowa laws of eminent domain to the laws of many other states, the questions presented are of general importance and of more than usual interest. We believe that this case is one which merits the consideration of this court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, A.D., 1953.

No. 209.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Petitioner,*

vs.

ARCHIE C. STUDE, WILLIAM LUMPKIN and POTTAWATTAMIE COUNTY, IOWA, *Respondents.*

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vs.

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CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Petitioner,*

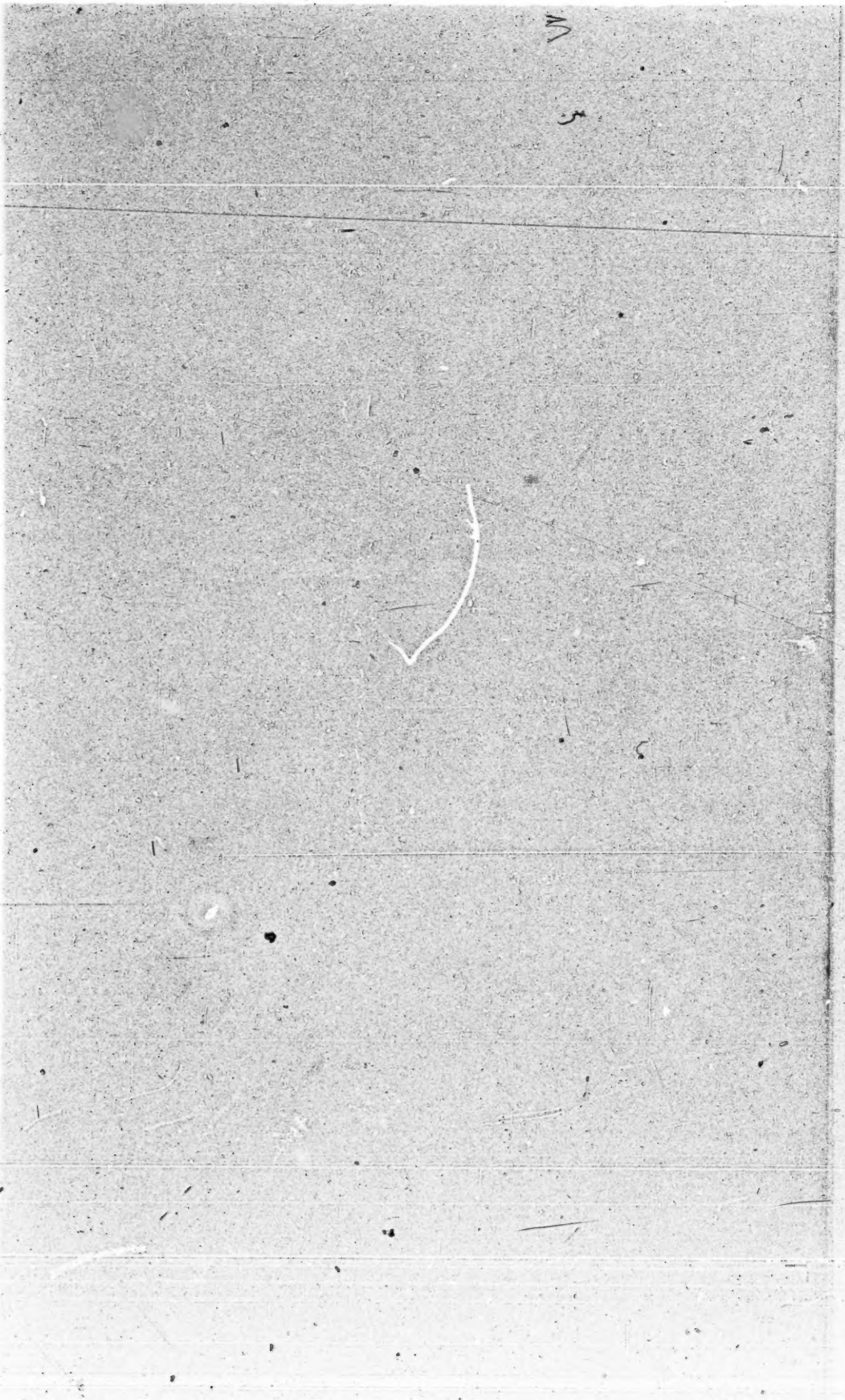
vs.

ARCHIE C. STUDE and WILLIAM LUMPKIN, *Respondents.*

BRIEF OF PETITIONER.

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I-A 15

Iowa law prescribes a purely administrative proceeding in eminent domain cases before the county sheriff. This proceeding is "in the nature of an inquest"; it has none of the attributes of a judicial proceeding and becomes a "civil action" only when the administrative procedure has been completed.

I-B 18

District Courts of the United States have original jurisdiction only in "civil actions" wherein diversity of citizenship and jurisdictional amount are present. Districts Courts of the United States have no jurisdiction over purely administrative proceedings prescribed by state law.

II 20

If state law provides that the power of eminent domain shall be exercised in an administrative proceeding, followed by a judicial action triable in the courts of the state, such action may neither be instituted in, nor removed to the United States Courts, until the administrative procedure has been completed and the controversy

Page

has become a civil action. On the other hand, if state law provides that proceedings under eminent domain shall be by a judicial proceeding in the courts of the state under supervision and control of judicial officers, then a non-resident condemnor may initiate such proceeding in an appropriate Federal Court.

III-A 30

Petitioner properly invoked the original jurisdiction of the United States District Court by filing its complaint and by issuance and service of summons, if, under Federal Law, it was properly designated a plaintiff. Service of the notice of appeal was necessary under state law to prevent the administrative award from becoming final and to convert the Iowa administrative proceeding into a "civil action."

III-B 36

In an action instituted in the Federal Courts the designation of a party as a plaintiff or a defendant is not controlled by state statutes or state procedural requirements but solely by the Federal law. If petitioner be a plaintiff in the Federal Court action, it properly invoked the original jurisdiction of the District Court; if it be a defendant in the action, it properly invoked Federal jurisdiction by removal.

IV-A 38

Rule 71A, Federal Rules of Civil Procedure, does not enlarge or affect the jurisdiction of the District Court of the United States.

IV-B 39

The law of eminent domain is purely statutory. Therefore, unless the state, by its statutes, has provided for a judicial proceeding or a civil action in eminent domain cases, the subject matter is not within the jurisdiction of the Federal Courts.

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V 40

The majority of the Court of Appeals has improperly construed the opinion of this Court in *Mason City & Fort Dodge R. R. Co. vs. Boynton*, 204 U.S. 570, 51 L.Ed. 629.

VI 42

Petitioner's procedure complied with all jurisdictional requirements of Rule 71A and the case was properly before the United States District Court.

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BRIEF OF PETITIONER.

THE OPINIONS BELOW.

The opinion of the Court of Appeals for the Eighth Circuit upon original submission in that Court is reported at 204 F.2d 116 and is reprinted at R. 77. Upon petition for rehearing the supplemental opinion of the majority Circuit Judge Collett and the dissenting opinion of Chief Judge Gardner are reported at 204 F.2d 954, and are reprinted at R. 101.

In the District Court for Southern Iowa the case is reported as *C. R. I. & P. R. Co. vs. Kay*, 107 F. Supp. 895, and is reprinted at R. 19-37.

JURISDICTION.

I.

The jurisdiction of this court to review the judgment and the decision of the Court of Appeals for the Eighth Circuit is expressly provided for by the Federal Judiciary Act, Tit. 28, Sec. 1254, U.S.C.A.

II.

The date of the final judgment to be reviewed is June 17, 1953, on which date the majority opinion of the Court of Appeals for the Eighth Circuit was filed, denying petitioner's petition for rehearing. This court granted certiorari October 12, 1953.

STATEMENT OF THE CASE.

This case presents questions as to the jurisdiction of the District Courts of the United States over civil actions arising under state statutes of eminent domain in diversity of citizenship cases. Petitioner, a railroad corporation organized under Delaware law and a citizen of that state, was authorized by certificate of the Interstate Commerce Commission to construct approximately thirty-four miles of new railroad line in Cass and Pottawattamie Counties, Iowa, and to abandon certain existing trackage. Residents of several communities, a number of landowners, including several of the respondents here, and others opposed the project before the Interstate Commerce Commission, and also unsuccessfully brought suit in the United States District Court for Southern Iowa before a three-judge court to set aside the certificate, and enjoin construction of the new railroad line.

Petitioner acquired all necessary right of way for the new line, except for ten parcels involved in this litigation,

with respect to which it was authorized by an Iowa regulatory commission to acquire title by condemnation. The statutes of Iowa grant to railroad corporations the power to condemn lands for railroad purposes, provided the state commission, by certificate, finds such condemnation necessary. The pertinent Iowa statutes are printed in the appendix and are here very briefly summarized.

(a) The proceeding is initiated by the filing of a written application with the sheriff of the county in which the land to be condemned is located, describing the lands affected and to be condemned. (Sec. 472.13, Iowa Code 1950)

(b) The sheriff thereupon appoints a commission of six resident, disinterested freeholders of the county to assess the damages to all real estate in the county desired by the applicant.

(c) After notice to all owners, tenants and lienholders, this commission "views, if necessary, the land sought to be condemned", assesses the damages which the owner will sustain, and files a written report thereof with the sheriff. (Sec. 472.14, Iowa Code 1950)

(d) The appraisement of damages returned by the commission is final unless appealed from. (Sec. 472.17, Iowa Code 1950)

(e) Any party interested may within thirty days after the assessment is made "appeal therefrom to the district court." (Sec. 472.18) The "appeal" is docketed in the name of the owner of the land, or of the party otherwise interested and appealing, as plaintiff, and in the name of the applicant for condemnation, as defendant, and is tried "as in an action by ordinary proceedings". (Sec. 472.21, Iowa Code 1950)

In passing, it may be noted that this Court, the Supreme Court of Iowa and the United States Court of Appeals for the Eighth Circuit had all previously held that the pro-

ceeding before the Iowa sheriff is purely administrative, "in the nature of an inquest", and not judicial in character; that the proceeding has none of the attributes of a judicial proceeding or a civil action until it reaches the courts by way of appeal from the administrative award, and at that time becomes a civil action.

Mason City & Fort Dodge R.R. Co. vs. Boynton, 204 U.S. 570, 51 L.Ed. 629.

Myers vs. C&NW R.R. Co., 118 Iowa 312, 91 N.W. 1076.

Des Moines Water Co. vs. City of Des Moines, 206 Fed. 657.

On January 18, 1952, petitioner filed with the Pottawattamie County, Iowa, Sheriff its verified written application for appointment of commissioners and assessment of damages with respect to the ten parcels of real estate here involved. After notice to the landowners, tenants and other interested parties, awards were made on various dates commencing on February 8, 1952 and ending February 12, 1952, aggregating more than $330,000, each award being very substantially in excess of $3,000. Petitioner deposited the amounts of some of the awards with the Sheriff and took possession of the land immediately after the awards were made. Deposits were later made as to each tract and petitioner took possession of the lands condemned prior to submission of the cause in the district court. The new line of railroad has been constructed.

On March 7, 1952, petitioner, as plaintiff, filed in the office of the Clerk of the United States District Court for Southern Iowa ten separate complaints, each of which was separately docketed, in which the owners of the real estate condemned, their tenants and lienholders were designated as parties defendant. Each complaint described the lands condemned and those affected, set forth the prior proceedings before the Iowa Sheriff, the amount of the award, and

that the award was grossly excessive, unreasonable and far in excess of any actual damage sustained by defendants. Each complaint alleged diversity of citizenship and jurisdictional amount. (R. 1-4)

Appended to each complaint as an exhibit was a form of notice of appeal served prior to the filing of the complaint upon the Sheriff of Pottawattamie County, Iowa, and the landowners and their tenants, which recited that the railroad company "has appealed and does hereby appeal from the award of damages made by Sheriff's Commissioners on or about February 12, 1952", (describing the lands taken and the amount of the award) The notice further recited that the "appeal is taken to the United States District Court for Southern Iowa, Western Division and 'will be docketed in the office of the Clerk of said court at Council Bluffs, Iowa, on or before the 7th day of March, 1952.'" (R. 4)

The prayer of each complaint was that the damages be fixed and determined upon trial of the action. In the case of Archie C. Stude the complaint alleged that the damages awarded were $23,888.60 to the landowner and $1,000 to his tenant, for the taking of 24.47 acres of agricultural land, while the actual damage did not exceed $10,000.

Summons was duly issued by the Clerk of the District Court in each case, in the usual form citing all named defendants in each case to answer the complaint within twenty days after service. The summons, accompanied by a copy of the complaint, was served on each defendant by the United States Marshal. (R. 9)

On March 10 and 11, 1952, petitioner served upon the Sheriff and the landowners and tenants of each parcel of real estate a notice of appeal to the District Court of Pottawattamie County, Iowa, in form complying with the Iowa law. Petitioner paid the filing fees and caused the notices of appeal to be docketed in the office of the Clerk of the Pottawattamie County, Iowa, District Court on March 11,

1952. The landowner and his tenant were there designated as plaintiffs and the railroad as defendant. On March 12, 1952, petitioner filed in the office of the Clerk of the U. S. District Court for Southern Iowa its verified petition for removal to that court of the ten actions pending in the Pottawattamie County, Iowa, District Court, alleged diversity of citizenship and that the amounts in controversy in each case exceeded $3,000. All requisite procedural notices and bonds were filed as prescribed by Tit. 28, Secs. 1442-1445, U.S.C.A.

Thus, as to each of the parcels petitioner first filed its original complaint, as plaintiff, in the United States District Court, caused a summons to be issued by the Clerk of that court and served by the Marshal. Thereafter, petitioner served notices of appeal from the awards made by sheriff's commissioners to the state court, docketed the ten cases in the state court and then took all necessary steps to remove such cases to the United States District Court for Southern Iowa.

On March 24, 1952, the landowners (respondents here) filed in each of the actions instituted by petitioner as plaintiff motions to dismiss (R. 10-11, inc.) which challenged the jurisdiction of the United States District Court because plaintiff (petitioner here) had elected to proceed under Chap. 472, Iowa Code 1950, and could not, having followed the Iowa procedure before the sheriff, invoke the jurisdiction of the District Court. Subject to the ruling on such motions to dismiss the landowners filed answers and counterclaims for damages (R. 12-17, inc.) which raised no question except as to the amounts of damages to which the landowners were entitled. On the same date in the ten cases removed from the state court to the United States District Court the landowners filed complaints, or petitions, in which they designated themselves as plaintiffs, as required by Iowa law, and also filed motions to remand each

of the cases to the state court because the railroad company "is not the defendant in said action within the meaning of Tit. 28, Sec. 1441, U.S.C.A., so as to be entitled to remove said action" (R. 49).

The motions to dismiss in the cases in which the railroad was plaintiff, and to remand to the state court in the cases in which the railroad was defendant were submitted at one time to the District Court on May 26, 1952, but the cases were not otherwise consolidated. On July 19, 1952, District Judge Riley filed a memorandum opinion and order which is set forth at R. 18-37, inc. After correctly outlining the prior proceedings (except for the statement that appeals to the state court were first taken in point of time), Judge Riley stated that the eminent domain proceeding prescribed by Iowa statutes was purely administrative, and not a "civil action"; that the proceeding did not become judicial in character until the case reached the courts by way of appeal. Numerous authorities from both state and Federal jurisdictions were cited in support of this conclusion. Judge Riley went on to say, "an action for condemnation of real estate is a civil action within the meaning of Tit. 28, Sec. 1332, U.S.C.A.", and might therefore have been commenced, in the first instance, in the United States District Court. Judge Riley held that petitioner, having followed state procedural statutes in initiating the proceeding before the Pottawattamie County Sheriff could not "go partly down the road of state procedure and then cut across from the sheriff's commissioners' award to this court" (R. 35); and that "it would be an unwarranted encroachment on the state's authority for this court to find and declare that the prescribed proceedings, despite their expressed and explicit detail, contemplate and permit an appeal from the commissioners' award directly to this court, instead of to the court named by the General Assembly of Iowa" (R. 28-29, inc.).

In the ten removal cases Judge Riley pointed out that the only controversy before the court was the amount of damages to which the landowners and their tenants were entitled, that the taking of the land was complete, and petitioner was "for every practical purpose at the time of the removal of these cases both a nominal and actual defendant" (R. 33). The motions to remand the removal cases to the state court were overruled.

Petitioner appealed to the Court of Appeals for the Eighth Circuit from the judgments of dismissal (R. 39). The landowners filed what their counsel denominated a "notice of cross-appeal" in each of the cases which were dismissed. They likewise served notices of appeal from the orders overruling their motions to remand to the state court (R. 57-58 inc.). By stipulation of the parties, approved by the District Court, the appeals and cross-appeals were submitted on one printed record, the case of Archie C. Stude, with the final judgment in that case to be entered in the other cases (R. 41-45, inc.). While petitioner contended that the orders overruling the motions to remand were not appealable orders, it consented that the Court of Appeals might determine the questions presented on both appeals.

The opinion of the Court of Appeals for the Eighth Circuit (Collett, Circuit Judge R. 77) was filed April 30, 1953, by which that court affirmed the judgment of dismissal in the ten cases in which petitioner had invoked the original jurisdiction of the District Court. The opinion stated simply that Iowa law gave petitioner no right to appeal from the commissioners' award to the United States District Court and that no such right existed; for that reason the judgment dismissing petitioner's action as plaintiff was proper. With respect to the cases removed to the District Court Judge Collett said that while the cases had not been consolidated, the propriety of the order of the District Court overruling the motion to remand was properly before the

Court under the rule of *Deckert vs. Independence Shares Corp.*, 311 U.S. 282, 85 L. Ed. 189. The opinion then quoted from and discussed the decision of this court in *Mason City & Fort Dodge R.R. Co. vs. Boynton*, 204 U.S. 570, 51 L.Ed. 629, 27 S.Ct. 321, and held that since this court there said that a non-resident landowner in an Iowa condemnation was a defendant, within the removal statutes, that such decision was decisive of the issue of removability. The order overruling respondents' motion to remand was reversed.

Petitioner, by timely petition for rehearing, urged that the opinion had ignored the contentions set forth in petitioner's briefs. The case of *Burford vs. Sun Oil Co.*, 319 U.S. 315, not cited on the original submission was specifically called to the attention of the court. On June 17, 1953, a majority of the Court of Appeals denied the petition for rehearing (R. 101-107). Judge Collett again speaking for the majority said that the filing of the complaint in the United States District Court and the service of summons could "not be treated as having created an original action in the Federal Court * * * since actions are not initiated in the Federal Courts by filing with a sheriff a request that he appoint commissioners to assess damages."

Chief Judge Gardner dissented from the denial of the petition for rehearing. He pointed out that the proceeding prescribed by Iowa law before the county sheriff was not judicial in character but that the proceeding upon appeal to the courts became a civil action; since diversity of citizenship and jurisdictional amount were both present, he concluded that a non-resident condemnor could not lawfully be denied access to the Federal Courts (R. 107).

SPECIFICATION OF ERRORS RELIED UPON FOR REVERSAL.

I.

The Court of Appeals for the Eighth Circuit erred in holding that the United States District Court for Southern Iowa was without jurisdiction to entertain petitioner's civil action in which it was designated as a party plaintiff, since diversity of citizenship and jurisdictional amount were present and petitioner initiated its action at the earliest possible time; the prior administrative proceeding before the Iowa Sheriff was not within the jurisdiction of a United States District Court, and the fact that petitioner had initiated that proceeding did not bar it from invoking Federal jurisdiction.

II.

The Court of Appeals for the Eighth Circuit erred in holding that petitioner's compliance with Iowa law prescribing an administrative proceeding before the county sheriff in eminent domain cases precluded a resort to the United States District Court when the proceeding became a civil action.

III.

The Court of Appeals for the Eighth Circuit erred in holding that petitioner was not a defendant in the action provided for by state law and designated as an "appeal" to the courts of the state. Petitioner was manifestly either the plaintiff or the defendant in the civil action prescribed by Iowa law. If plaintiff, it was entitled to invoke the original jurisdiction of the District Court; and if defendant, it

was entitled to reach the District Court by removal proceedings.

IV.

The Court of Appeals for the Eighth Circuit erred in holding that the filing of the complaint in the United States District Court and the issuance of summons was not the commencement of an original action in that court, and in holding that petitioner "strictly followed the Iowa procedure for initiating a condemnation suit in the Iowa state courts"; and that the "complaint filed in the United States District Court cannot be treated as having created an original action." (R. 102)

SUMMARY OF ARGUMENT.

I.

A.

Iowa law prescribes a purely administrative proceeding in eminent domain cases before the county sheriff. This proceeding is "in the nature of an inquest"; it has none of the attributes of a judicial proceeding and becomes a "civil action" only when the administrative procedure has been completed.

Mason City & Fort Dodge R.R. Co. vs. Boynton, 204 U.S. 570, 51 L.Ed. 629.
Myers vs. C&NW R.R. Co., 118 Iowa 312, 91 N.W. 1076.
Des Moines Water Co. vs. City of Des Moines, 206 Fed. 657.

B.

District Courts of the United States have original jurisdiction only in civil actions wherein diversity of citizenship and jurisdictional amount are present. District Courts of

the United States have no jurisdiction over purely administrative proceedings prescribed by state law.

Tit. 28, Sec. 1332, U.S.C.A.

Delaware County vs. Diebold Safe & Lock Co., 133 U. S. 626, 33 L.Ed. 674.

II.

If state law provides that the power of eminent domain shall be exercised in an administrative proceeding, followed by a judicial action triable in the courts of the state, such action may neither be instituted in, nor removed to the United States Courts, until the administrative procedure has been completed and the controversy has become a civil action. On the other hand, if state law provides that proceedings under eminent domain shall be by a judicial proceeding in the courts of the state under supervision and control of judicial officers, then a non-resident condemnor may initiate such proceeding in an appropriate Federal Court.

Searl vs. School District, 124 U.S. 197, 31 L.Ed. 415.

Madisonville Traction Co. vs. St. Bernard Mining Co., 196 U.S. 239, 49 L.Ed. 462.

Mississippi & Rum River Boom Co. vs. Patterson, 98 U. S. 403, 25 L.Ed. 206.

Franzen vs. Chicago, Milwaukee and St. Paul Railroad Company, 278 Fed. 370.

Williams Livestock Co. vs. D.L.&W. R.R. Co., 285 Fed. 795.

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Ellis vs. Associated Ins. Corp., 24 F.2d 809 (C.A. 5th).

Flowers vs. Aetna Casualty & Sureties Co., 154 F.2d 881 (C.A.6th).

III.

A.

Petitioner properly invoked the original jurisdiction of the United States District Court by filing its complaint and by issuance and service of summons if, under Federal law, it was properly designated a plaintiff. Service of the notice of appeal was necessary under state law to prevent the administrative award from becoming final, and to convert the Iowa administrative proceeding into a "civil action".

Rules 3 and 4, Federal Rules of Civil Procedure.
Madisonville Traction Co. vs. St. Bernard Mining Co., 196 U.S. 239, 49 L.Ed. 462.
Burford et al vs. Sun Oil Co. et al, 319 U.S. 315, 87 L. Ed. 1424.

B.

In an action instituted in the Federal Courts the designation of a party as a plaintiff or a defendant is not controlled by state statutes or state procedural requirements but solely by the Federal law. If petitioner be a plaintiff in the Federal Court action, it properly invoked the original jurisdiction of the District Court; if it be a defendant in the action, it properly invoked Federal jurisdiction by removal.

Mason City & Fort Dodge R.R. Co. vs. Boynton, 204 U. S. 570, 51 L.Ed. 629.
Shamrock Oil & Gas Corp. vs. Sheets, 313 U.S. 100, 85 L.Ed. 1214, 61 S.Ct. 868.

IV.

A.

Rule 71A, Federal Rules of Civil Procedure, does not

enlarge or affect the jurisdiction of the District Courts of the United States.

Rule 82, Federal Rules of Civil Procedure.

B.

The law of eminent domain is purely statutory. Therefore, unless the state, by its statutes, has provided for a judicial proceeding on a "civil action" in eminent domain cases, the subject matter is not within the jurisdiction of the Federal Courts.

V.

The majority of the Court of Appeals has improperly construed the opinion of this Court in *Mason City & Fort Dodge R.R. Co. vs. Boynton*, 204 U.S. 570, 51 L.Ed. 629.

VI.

Petitioner's procedure complied with all jurisdictional requirements of Rule 71A and the case was properly before the United States District Court.

ARGUMENT.

I.

A.

Iowa law prescribes a purely administrative proceeding in eminent domain cases before the county sheriff. This proceeding is "in the nature of an inquest"; it has none of the attributes of a judicial proceeding and becomes a "civil action" only when the administrative procedure has been completed.

The Court of Appeals for the Eighth Circuit held that petitioner was precluded from invoking the jurisdiction of the United States District Court: first, because state law gave it only a right of "appeal" to a state court, no right existed to resort to the United States District Court; and, second, because petitioner followed state law by instituting its condemnation proceeding before the Sheriff, it was thereby barred from entering the Federal Court.

At the outset it is important for this court to consider the nature of the proceeding prescribed by Iowa eminent domain statutes. The Iowa Supreme Court, the Court of Appeals for the Eighth Circuit, and this Court have all by prior decisions established that the initial procedure prescribed by Iowa law is purely administrative in character.

In *Myers vs. C&NW R.R. Co.*, 118 Iowa 312, 91 N.W. 1076, it appeared that the railroad filed with an Iowa sheriff an application for condemnation of a strip of ground for railroad right of way. Commissioners were appointed and returned a written award of damages. The landowners appealed to the state court and the railroad company filed its petition for removal in that court, as then required by Federal law. The landowners challenged the railroad's right to remove to the Federal Court on the ground that the condemnation proceedings did not constitute a suit of

a civil nature, and in any event, the proceedings were not removable. The state district court sustained this challenge, and upon trial, a large verdict was returned in favor of the landowners, from which the railroad appealed to the State Supreme Court, which reversed the judgment. After carefully analyzing the Iowa statutes Chief Justice Ladd of the Iowa Supreme Court said:

> "From these statutes it plainly appears that the proceeding before the commissioners appointed by the sheriff to appraise the land is not a suit at law, but in the nature of an inquest to ascertain its value. No hearing is had, and no evidence introduced. The commissioners merely inspect the land, determine upon the amount of damages which will be occasioned by the appropriation, and make a written report to the sheriff. Thus far then the proceeding is in no respect a suit. That 'term is certainly a very comprehensive one' said Chief Justice Marshall in *Weston v. City of Charleston*, 2 Pet. 464, 7 L.Ed. 481, 'and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy which the law affords. The modes of proceeding may be various, but, if a right is litigated in a court of justice, the proceeding by which the decision of the court is sought is a suit.' Unless in court, or before those exercising judicial functions, the proceeding cannot be regarded as a suit. *Wishafer v. Stewart*, 71 Pa. St. 174; *Ex parte Towles*, 48 Tex. 433. That the proceeding to condemn land is not a suit, within the language of the Removal Acts of Congress, and are such after the appeal to the district court, seems to be conclusively settled against the appellees in *Boom Co. v. Patterson*, 98 U.S. 403 (25 L.Ed. 207), and *Railroad Co. v. Myers*, 115 U.S. 1 (5 Sup. Ct. Rep. 1113, 29 L. Ed. 319)."

The Eighth Circuit Court of Appeals in a case arising under Iowa law also held that such proceeding while before an administrative tribunal was not a judicial action, and,

therefore, could not be removed to the United States District Court. In *Des Moines Water Co. vs. City of Des Moines*, 206 Fed. 657, Iowa law permitted municipalities to condemn waterworks properties, and provided for an appraisal to be made by a board composed of state district judges, residing outside the county where the municipality was located, the board to be appointed by the Chief Justice of the State Supreme Court. The water company, a non-resident of the state, attempted to remove the proceeding to the Federal Court. The District Court dismissed its complaint, and the Eighth Circuit Court of Appeals in affirming the judgment said:

> "At the time that the petition for removal was filed, the proceeding was not then a 'suit' within the meaning of the removal acts." *Kaw Valley Drainage District vs. Metropolitan Water Co.*, 186 Fed. 315.

In the *Kaw Valley Drainage District case*, supra, the laws of Kansas authorized drainage districts to acquire property by condemnation with a preliminary appraisal to be made by commissioners. The Metropolitan Water Company, a non-resident, was served with a notice of hearing before such commission and attempted to remove the proceeding to an appropriate United States District Court. The District Court sustained the removal, and enjoined the state condemnation commissioners from further action. The Eighth Circuit Court of Appeals reversed and, in the course of its opinion, said:

> "The several decisions of the Supreme Court, relating to this subject, are in perfect harmony, to the effect that the power of eminent domain may be exercised by the state in such mode as it sees fit. It may be by administrative inquest, if provision is made permitting a determination of the amount of damages by a civil action at some period before the proceedings become final, or the proceeding may be by civil action

at the outset. If the former, the federal courts are without jurisdiction until the proceedings assume the character of a civil action, when, by the latter mode, federal courts may have jurisdiction from the inception of the proceeding, if the requisite diversity of citizenship and amount in controversy exists."

That Iowa law prescribes an administrative proceeding "in the nature of an inquest" was expressly recognized by the decision of this court in *Mason City & Fort Dodge R. R. Co. vs. Boynton*, 204 U.S. 570, 51 L.Ed. 629. There speaking for this court Mr. Justice Holmes said of the Iowa statutes:

> "The first step is the valuation. Whether it is part of the case or not, it is a necessary condition to the proceedings in court."

The proceeding before the Iowa sheriff does not involve the taking of evidence and the commissioners may or may not view the premises in their sole discretion. It is clear that such proceeding involves no judicial inquiry, and that it is a mere "preliminary inquest", as both this Court and the Supreme Court of Iowa have held. It is only when the "preliminary inquest" has been completed that the proceeding becomes a "civil action."

B.

District Courts of the United States have original jurisdiction only in "civil actions" wherein diversity of citizenship and jurisdictional amount are present. District Courts of the United States have no jurisdiction over purely administrative proceedings prescribed by state law.

Since the proceeding before the Iowa sheriff is purely administrative in character, it seems to us to require no argument to demonstrate that such proceeding could not have been inaugurated in a District Court of the United

States. Jurisdiction of the District Courts is limited to "civil actions". This is prescribed by Tit. 28, Sec. 1332, U.S.C.A. The words of this statute are plain and admit of no other construction.

Prior decisions of this court make it plain that proceedings conducted before executive or administrative officers under state statutes for the preliminary determination of factual questions, or even the acquisition of legal rights, do not constitute a civil action within the meaning of the Judicial Code. Thus, in *Delaware County vs. Diebold Safe and Lock Company*, 133 U.S. 626, 33 L.Ed. 674, it appeared that under a statute of Indiana a board of county commissioners was authorized to hear, allow, and determine claims against a county based on contracts; and, if not appealed from, the decision of the commissioners was final. An appeal was provided to a state court where the cause was tried as an original action. The Diebold Safe and Lock Company, as subcontractor and assignee of the principal contractor for the building of a jail for the county, filed its claim with the county board of commissioners where it was disallowed. It appealed from the disallowance of the claim to the appropriate state court and then filed petition for removal to an appropriate United States District Court (removal at that time being available to either a plaintiff or a defendant in diversity cases). The county moved to remand the case to the state court; and, when the case reached the Supreme Court of the United States, error was assigned on the denial of such motion to remand. This court in an opinion by Mr. Justice Gray pointed out that under the statutes of Indiana the proceedings before the commissioners for the allowance of claims:

> "are in the nature, not of a trial *inter partes*, but of an allowance or disallowance, by officers representing the county, of a claim against it. At the hearing before the commissioners there is no representative of the county,

> except the commissioners themselves; they may allow the claim, either upon evidence introduced by the plaintiff, or without other proof than their own knowledge of the truth of the claim; and an appeal from their decision is tried and determined by the circuit court of the county as an original cause, and upon the complaint filed before the commissioners. * * * It follows, according to the decisions of this court in analogous cases, that the trial in the Circuit Court of the County was 'the trial' of the case, at any time before which it might be removed into the circuit court of the United States, under clause 3 of section 639 of the Revised Statutes."

The District Courts of the United States have jurisdiction only in "civil actions", and, therefore, cannot take cognizance of administrative proceedings, even though diversity of citizenship and jurisdictional amount are present, because Congress has not granted them jurisdiction over such controversies. It seems to us quite elementary that the jurisdiction of the District Courts is confined to judicial proceedings or "civil actions" as the statute itself prescribes. The courts below were manifestly in error in holding that petitioner might have initiated its condemnation action by filing a complaint in the Federal Court in Iowa and that the U. S. Marshal could then appoint commissioners to appraise the damages.

II.

If state law provides that the power of eminent domain shall be exercised in an administrative proceeding, followed by a judicial action triable in the courts of the state, such action may neither be instituted in, nor removed to the United States Courts, until the administrative procedure has been completed and the controversy has became a civil action. On the other hand, if state law provides that pro-

ceedings under eminent domain shall be by a judicial proceeding in the courts of the state under supervision and control of judicial officers, then a non-resident condemnor may initiate such proceeding in an appropriate Federal Court.

For almost a century this court has consistently recognized that eminent domain proceedings under state law, when prosecuted in the courts of a state constitute a judicial proceeding, or a "civil action" within the meaning of applicable Federal statutes. Just as consistently this court has recognized that if state law of eminent domain prescribes an administrative proceeding, such state procedure must be followed before state administrative tribunals to its completion.

The first case in which this court had occasion to consider the question was *Mississippi & Rum River Boom Co.*, 98 U.S. 403, 25 L.Ed. 462, decided March 3, 1879. There Patterson owned one entire island and parts of two others in the Mississippi River in Anoka County, Minnesota, which island formed an ideal site for forming a log boom of very extensive dimensions. Minnesota law authorized condemnation of boom sites and provided for the preliminary appointment of appraisers with an appeal to the district court of the state by any party. The proceeding was initiated, commissioners were appointed, and an award of $3,000 was made to Patterson. Both the company and Patterson appealed. Patterson, who was a citizen of Illinois, removed the case to the Circuit Court of the United States. The condemnor contended that the Federal Court was without jurisdiction. This court in speaking by Mr. Justice Field said:

> "The proceeding in the present case before the commissioners appointed to appraise the land was in the nature of an inquest to ascertain its value, and not a

suit at law in the ordinary sense of those terms. But when it was transferred to the District Court by appeal from the award of the commissioners, it took, under the statute of the State, the form of a suit at law, and was thenceforth subject to its ordinary rules and incidents. The point in issue was the compensation to be made to the owner of the land; in other words, the value of the property taken. No other question was open to contestation in the District Court. *Turner v. Holleran*, 11 Minn. 253. The case would have been in no essential particular different had the State authorized the Company by statute to appropriate the particular property in question, and the owners to bring suit against the Company in the courts of law for its value. That a suit of that kind could be transferred from the State to the Federal Court, if the controversy were between the company and a citizen of another State, cannot be doubted. And we perceive no reason against the transfer of the pending case that might not be offered against the transfer of the case supposed."

In *Searl vs. School District*, 124 U.S. 197, 31 L.Ed. 415, the statutes of Colorado provided for condemnation of lands by school districts. The procedure prescribed was to file a petition in the district court of the state containing a description of the property to be condemned, the names of all persons interested, followed by a preliminary appraisal of damages, by a commission of three freeholders appointed by the court. Upon demand by any landowner a trial before the court or jury was provided for in which the amount of damages was determined by verdict or judgment. Searl was a resident of Kansas; and, when the school district filed its condemnation petition in the Colorado court, he filed his petition and bond for removal to the Federal Court, which the state court granted. On motion the Circuit Court remanded the case to the state court. This court said:

"The fact that the Colorado Statute provides for the ascertainment of damages by a commission of three freeholders, unless at the hearing a defendant shall demand a jury, does not make the proceeding from its commencement any the less a suit at law within the meaning of the Constitution and Acts of Congress and the previous decisions of this court. The appointment of the commissioners is not, as in the case of *Mississippi & R. R. Boom Co. v. Patterson* and the *Pacific Railroad Removal Cases* a step taken by the party seeking to make the appropriation *ex parte*, and antecedent to the actual commencement of the adversary proceeding *inter partes*, which constitutes a suit in which the controversy takes on the form of a judicial proceeding. Because under the Colorado law the appointment of the commissioners is a step in the suit after the filing of the petition and the service of summons upon the defendant. It is an adversary judicial proceeding from the beginning. The appointment of commissioners to ascertain the compensation is only one of the modes by which it is to be determined. The proceeding is, therefore, a suit at law from the time of the filing of the petition and the service of process upon the defendant."

In *Union Pacific Railway Co. vs. Myers*, 115 U.S. 1, 29 L. Ed. 319, a statute of Missouri provided for the opening of streets by ordinance adopted by a city council with a preliminary determination of the damages to which the property owner was entitled by a commission appointed by the mayor of the town. Any party dissatisfied with the award of the commissioners was authorized to appeal to the circuit court of the county. The City of Kansas City instituted the statutory proceeding for widening a street running through the depot grounds of the railroad, and after a preliminary award by commissioners, an appeal was taken to the Circuit Court of Jackson County. A petition for removal of the case to the Circuit Court of the United States was

duly filed. It was urged that the removal was too late, since the proceeding before the commission constituted a trial and the case was therefore not removable. Referring to the decision of Mr. Justice Field in *Boom Company vs. Patterson*, supra, this court speaking by Mr. Justice Bradley said:

> "It was there held that the preliminary proceedings were in the nature of an inquest to ascertain the value of the property condemned, or sought to be condemned by the right of eminent domain, and was 'not a suit at law in the ordinary sense of those terms,' consequently not 'a suit' within the meaning of the Removal Acts; but that 'when it was transferred to the District Court by appeal from the award of the commissioners, it took, under the statute of the State, the form of a suit at law, and was thenceforth subject to its ordinary rules and incidents. * * * That case, we think, governs the present, so far at least as relates to the trial before the mayor, which was in its nature an inquest of valuations and assessments, not having the character of a suit."

The later case of *Madisonville Traction Co. vs. St. Bernard Mining Co.*, 196 U.S. 239, 49 L.Ed. 462, involved the right of removal of an eminent domain proceeding instituted under Kentucky law in a court of that state. This court in an opinion by Mr. Justice Harlan first analyzed the Kentucky eminent domain statutes which provided that any company authorized to construct a railroad might file in the office of the Clerk of the county court a description of the land necessary for its use; and commissioners appointed by a judge of the court were required to make an award of damages in writing. The Clerk of the court thereupon issued process against the landowners to appear in court and show cause why the commissioners' report should not be confirmed. Exceptions to the commissioners' report might be filed by either party. A jury was then impaneled to try the

issues of fact, and judgment of the court rendered in conformity to the verdict. Upon payment of the amount due and the confirmation of the commissioners' report, or the finding of the jury upon the trial, the railroad company became entitled to take possession of the land. The traction company instituted its proceeding and commissioners appointed by the court awarded $100 as damages and process was issued citing the mining company to appear and show cause why the award should not be confirmed. The mining company thereupon filed its petition and bond for the removal of the case to the Circuit Court of the United States, alleging diversity of citizenship and jurisdictional amount. Mr. Justice Harlan pointed out that by statute a suit which was within the original jurisdiction of the United States District Court was removable and then said:

> "Why could not the proceeding instituted in the county court have been brought originally in the Federal court? The case, as made in the county court, was, beyond question, a judicial proceeding; it related to property rights; the parties are corporate citizens of different states; and the value of the matter in dispute exceeded the amount requisite to give jurisdiction to the circuit court. It was, therefore, a proceeding embraced by the very words of the Constitution of the United States, which declares that the 'judicial power shall extend . . . to controversies . . . between citizens of different states', as well as by the act of 1887 (Sec. 1), which declares 'that the circuit courts of the United States shall have *original* cognizance, concurrent with the courts of the several states, of *all* suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000, . . . in which there shall be a controversy between citizens of different states'. In view of these explicit provisions it is clear that the proceeding in the county court was a suit or controversy within the meaning both of the Constitution and of the

judiciary act. We could not hold otherwise without overruling former decisions of this court."

The Court of Appeals for the Eighth Circuit recognized the clear distinction between an eminent domain proceeding, judicial in character, and one administrative in character, in the two cases of *Des Moines Water Company vs. City of Des Moines*, 206 Fed. 657, (which dealt with an Iowa statute), and *Kaw Valley Drainage District vs. Metropolitan Water Co.*, 186 Fed. 315 (dealing with a Kansas statute). We have already cited and quoted from those decisions and will not again advert to them here.

In the two courts below it was urged that petitioner might have instituted its eminent domain proceeding initially in the United States District Court and that, having elected to proceed before the Iowa sheriff, it was precluded from Federal jurisdiction. The District Court adopted this view; the Court of Appeals first said that no right to institute the judicial action in the Federal Court existed because no such right was granted by the statutes of Iowa. On petition for rehearing that court apparently changed the basis of its conclusion by pointing out that suits were not instituted in the United States District Court by applying to a state sheriff for appointment of commissioners to appraise damages.

The trial court thought that any case for the appropriation of lands under the state power of eminent domain was a "civil action" from its inception, regardless of the character of the proceeding required by state law, and in support of its contention cited the cases of *Mississippi & Rum River Boom Co. vs. Patterson*, supra, and *Franzen vs. Chicago, Milwaukee and St. Paul Railroad Company*, 278 Fed. 370. These authorities along with *Williams Livestock Co. vs. D.L.&W. R.R. Co.*, 285 Fed. 795, are all clearly distinguishable as we shall point out.

In the *Franzen* case the statutes of Illinois provided for a judicial proceeding in eminent domain cases to be initiated by the filing of a complaint with the Clerk of the state court, appointment of commissioners by a judge of the court, and further proceedings in a state court of record. The Seventh Circuit Court of Appeals was careful to point out this salient requirement of state law in its opinion which held that the case was properly instituted in a Federal district court.

The Pennsylvania statutes considered in *Williams Livestock Co. vs. D.L.&W. R.R. Co.*, 285 Fed. 795, provided for a judicial action in the Court of Common Pleas in condemnation cases with all steps, including the appointment of "viewers", under the direction of a judge of that court. In that case Witmer, District Judge, said of the Pennsylvania statute:

> "The condemnation and appropriation of the plaintiff's land was complete when the defendant railroad company entered its bond in the county courts where the land is located. Immediately thereon the plaintiff was invested with the right to proceed against the defendant to recover the damages sustained. This, the statute provides, shall be done by the appointment of viewers preliminary to a trial by jury, if that be demanded by either of the parties. Though the first step in the proceeding is by petition for the appointment of viewers, and not by writ to bring the defendant into court to answer, it nevertheless has the same end in view, to litigate a controversy between parties, and may be regarded as the beginning of a suit of a civil nature, whereof this court shall have original cognizance, concurrent with the courts of the several states."

It is, of course, fundamental that in diversity cases the Courts of the United States will entertain judicial proceedings authorized by state statute and adjudicate, protect, and enforce rights granted by state statutes. We believe

that the answer to the question here presented would be very simple had the Iowa statute instead of providing for an "appeal" from the administrative award merely said that any party aggrieved might institute an action in a court of competent jurisdiction where the case should he heard *de novo*. The mere fact that the Iowa statutes provide for an appeal only to a state court does not deprive National Courts of jurisdiction. This is true because it is fundamental that purely procedural state statutes may neither restrict, deny, nor enlarge the *jurisdiction* of the Courts of the United States. The right of a litigant to resort to the United States Courts is governed solely by the Constitution and laws of the United States.

The Court of Appeals for the Eighth Circuit itself in *Texas Pipe Line Co. vs. Ware*, 15 F.2d 171, speaking by the late Judge Kenyon said concerning a workmen's compensation law of Louisiana, which, by statute, was to be administered and applied in a judicial proceeding in the courts of the state:

> "The right to compensation for injury to an employe under certain conditions was provided by the Louisiana statutes. That right is governed and conditioned by the law of the state where granted. The remedy provided to enforce it was a court action, which is governed by the law of the forum. This action was a transitory one, and could be maintained in a court of the United States having jurisdiction of the subject matter and the parties. Undeniably the right sought to be enforced is not in any way contrary to the public policy of the United States. The effort to confine the action to the domicile of defendant was ineffectual. Plaintiff had a choice of tribunals in which to test his right to compensation. As said in *Davis v. Gray*, 16 Wall. 203, 221, 21 L.Ed. 447: 'A party by going into a national court does not lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality.' There may be some

few provisions of the act which perhaps could be more easily carried out in the courts of Louisiana. Such provisions can properly be held to apply where a suit is brought in the state court. We see no insuperable difficulties, however, to the federal courts enforcing the provisions of the Compensation Law. There is no sound reason to challenge the jurisdiction of the United States District Court in this case."

Under the Texas statutes relating to workmen's compensation an injured employee first proceeds before a Texas administrative board and either party aggrieved by the award may bring an action in the courts, and a trial is then held before a court and jury. In *Associated Industries Corp. vs. Ellis*, 15 F.2d 464, Aff'd as *Ellis vs. Associated Industries Corp.*, 24 F.2d 809, it is held that such action may be instituted in an appropriate United States District Court, after the administrative proceedings before the Compensation Board have been completed.

We believe the correct rule to be drawn from all of these authorities is, as the Eighth Circuit Court itself said in the *Kaw Valley Drainage District case:* supra:

"If state law provides for an administrative proceeding to be followed by a civil action, the Federal Courts are without jurisdiction until 'the proceedings assume the character of a civil action'. But if state law provides for a judicial proceeding, then the Federal Courts have jurisdiction from the inception of such proceeding."

The law of Iowa clearly provides for an administrative proceeding, with the right to either party to have the matter tried *de novo* in a civil action in the courts of the state. This administrative proceeding could not have been instituted in the United States District Court. The proceeding did not become a "civil action" until the administrative procedure had been concluded. Since petitioner could not,

in any event, have instituted its condemnation proceeding in the United States District Court, it is clear that it sought Federal jurisdiction at the earliest possible moment.

We submit, therefore, that the conclusion of the District Court, adopted on petition for rehearing by the Court of Appeals, that petitioner, because it instituted the purely administrative proceeding required by Iowa statutes before the Iowa Sheriff, was thereby precluded from initiating the civil action also provided for by Iowa law in the United States Courts was clearly erroneous. We are firmly convinced that the only question presented by this record is whether petitioner was properly designated as a plaintiff or a defendant in the United States District Court. This question will be discussed in the next division of this brief.

III.

A.

Petitioner properly invoked the original jurisdiction of the United States District Court by filing its complaint and by issuance and service of summons, if, under Federal law, it was properly designated a plaintiff. Service of the notice of appeal was necessary under state law to prevent the administrative award from becoming final and to convert the Iowa administrative proceeding into a "civil action."

In denying the rehearing sought by petitioner a majority of the Court of Appeals said that under the record petitioner had failed to properly invoke the jurisdiction of the District Court; that it had complied strictly with the Iowa procedure for initiating a condemnation suit in the courts of the state; that the complaint filed by petitioner "was required by the Iowa statutes;" that "the complaint filed in the United States District Court cannot be treated as

having created an original action in the Federal Court". (R. 102) Following these pronouncements the majority closed the opinion with the following somewhat astounding statements:

> "It may well be that if this action had been commenced in the United States District Court, that court would have had jurisdiction. But actions are not initiated in the federal courts by filing with a sheriff a request that he appoint commissioners to assess damages. It might also be that if the action had been initiated in the federal court that that court would have followed the Iowa procedure under Rule 71A. But it was not asked to do so. And we do not pass upon that question because it, like the question of whether the action could have been initiated in the federal court, is not in the case." (R. 102-103)

Thus, a majority of the Court of Appeals not only ignored the fundamental rules of law so clearly established by the authorities cited in the preceding division of this brief, but disregarded also salient facts with respect to jurisdiction of the District Court. It may be of some benefit to briefly restate the situation confronting petitioner and its counsel when the excessive and exorbitant awards were returned by the sheriff's commissioners in the administrative proceeding. The situation was this:

(a) The Iowa statutes made the awards final unless appealed from.

(b) This Court, by its decision in *Mason City & Fort Dodge R.R. Co. vs. Boynton*, 204 U.S. 570, 51 L.Ed. 629, had raised very serious doubts whether petitioner's status was that of a plaintiff or a defendant in Federal Court proceedings in the civil action provided for by Iowa law, and as to the right of petitioner to reach the United States District Court if it strictly followed state statutes. On the other hand, if petitioner failed to appeal from the administra-

tive awards, they might well be held to have become a finality.

Petitioner was manifestly either the plaintiff or the defendant in the action "triable by ordinary proceedings" prescribed by the Iowa Code; if a plaintiff, then, having exhausted the administrative procedure, petitioner could properly invoke the original jurisdiction of the United States District Court; if a defendant, petitioner could reach the District Court by removal proceedings. In view of the grave doubts as to the proper procedure, petitioner elected to preserve its rights both as a plaintiff and a defendant. It first served upon the sheriff and the landowners in each case a notice stating that it had "appealed" from the awards and that the "appeal" would be docketed in the United States District Court on or before March 7, 1952 (the next day following service of the notice). On March 7, 1952, petitioner filed its complaint in the office of the Clerk of the United States District Court. The complaint designated petitioner as plaintiff and the landowner, his tenants and lienholders defendants in each action. The complaint in each case set forth diversity of citizenship and jurisdictional amount, described the property affected by the condemnation, and that appropriated, alleged the excessive and unreasonable character of the awards, and prayed that on a trial of the cause the damages be fixed and determined. (R. 1-4)

Summons was issued by the Clerk citing the defendants named "to answer the complaint, copy of which is herewith served upon you, within 20 days" (R. 9), which was served by the United States Marshal.

It is difficult for us to find any basis whatever, in the record for the statements found in the majority opinion overruling the petition for rehearing. Under Iowa law the condemnor files no complaint, or petition in the state court. This is done by the landowner who, by statute, is

the plaintiff, and the condemnor is the defendant. The complaints filed in the United States Court were filed by petitioner, not by the landowner, while petitions were filed by the landowners in the removal cases in accordance with state law.

Equally unsupported is the conclusion of the majority that petitioner's complaint in the United States District Court "cannot be treated as having created an original action in the Federal Court". We must confess that we cannot understand this statement of the majority for Rule 3, Federal Rules of Civil Procedure, expressly provides that a suit is commenced in the United States District Court by filing a complaint. Under the Federal rules petitioner took every step necessary to invoke the original jurisdiction of the Federal Court, and there was nothing further which it could have done to initiate its "civil action" in that court.

Had petitioner believed that the action was instituted in the Federal Court by serving the notice of appeal on the sheriff and the landowners, not only would no complaint have been filed in the United States District Court, but no summons was required. What petitioner did was simply to follow Iowa law through the administrative procedure, and then to serve a notice of appeal, to convert the administrative proceeding into a suit, or "civil action", a step necessary by state law to prevent the award from becoming a finality. Immediately thereafter petitioner commenced its original action in the United States District Court. It is, therefore, plain that the conclusion of the majority of the Court of Appeals that petitioner did not properly invoke the original jurisdiction of the District Court was in error.

If there be any question about the right of petitioner to bring its civil action in the United States District Court, although state law provides only for an appeal to a state tribunal, it has been decided by this Court in the recent

case of *Burford et al vs. Sun Oil Co. et al*, 319 U.S. 315, 87 L.Ed. 1424. It there appeared that statutes of Texas provided that no new oil wells could be drilled without securing a certificate or permit from the state railroad commission after an administrative proceeding before that body. An appeal was authorized by statute from the commissioners' decision to a state equity court. Burford applied to the commission for a permit to drill wells and his application was opposed by Sun Oil Company. The permit was granted and Sun Oil Company, a non-resident, then instituted in the United States District Court an equity action to set aside the permit and order of the commission, charging that the permit was invalid under state law and that the statutory scheme of regulation of drilling wells as administered deprived Sun of rights and property in violation of constitutional guaranties. The United States District Court dismissed the complaint on the ground that it lacked jurisdiction, since state law provided only for an appeal to a state court. The Court of Appeals for the Fifth Circuit reversed and held Sun entitled to certain equitable relief. This Court reviewed the case, and the opinion of the majority, written by Mr. Justice Black, held that the case was within the jurisdiction of the District Court but that court should have remitted the parties in the first instance to the state courts because of possible conflict between state and Federal regulatory authority. This Court, speaking by Mr. Justice Black, said:

> "Jurisdiction of the federal court was invoked because of the diversity of citizenship of the parties, and because of the Companies' contention that the order denied them due process of law. There is some argument that the action is an 'appeal' from the State Commission to the federal court, since an appeal to a state court can be taken under relevant Texas statutes; but, of course, the Texas legislature may not make a

federal district court, a court of original jurisdiction, into an appellate tribunal or otherwise expand its jurisdiction, and the Circuit Court of Appeals in its decision correctly viewed this as a simple proceeding in equity to enjoin the enforcement of the Commission's order."

Thus, it appears that the procedure adopted by petitioner in the case at bar was identical in every respect with the procedure followed by Sun Oil Company in the *Burford* case. The statement of the majority "that condemnor did not file its action in the United States District Court, as was done in the *Burford* case" is, therefore, incorrect.

Of course, the situation which was presented in the *Sun Oil Company* case is not involved in the case at bar. Iowa law expressly grants to all railroad corporations the right of eminent domain and provides for a civil action to determine the amount which the railroad must pay. No question of conflict between a state regulatory body and the Federal judiciary arises here. While there is a suggestion in the opinion of District Judge Riley that to sustain Federal jurisdiction under the facts shown would constitute an "unwarranted intrusion" into the proceedings, it is plain that Judge Riley meant that the "intrusion" would occur because he regarded the institution of the proceedings before the sheriff as the commencement of a "civil action".

We submit, therefore, that petitioner here followed the administrative procedure prescribed by Iowa law just as was done in *Burford vs. Sun Oil Company*, supra; that when the administrative procedure was concluded, petitioner properly commenced an original action in the United States District Court just as did Sun Oil Company; and the fact that petitioner here served the notice of appeal required by state law did not waive or bar its right to commence its

suit in the District Court of the United States. In fact, this case and the *Burford* case "walk on all fours", except for the issue of possible conflict between state and Federal jurisdictions, a question not involved in the case at bar.

B.

In an action instituted in the Federal Courts the designation of a party as a plaintiff or a defendant is not controlled by state statutes or state procedural requirements but solely by the Federal law. If petitioner be a plaintiff in the Federal Court action, it properly invoked the original jurisdiction of the District Court; if it be a defendant in the action, it properly invoked Federal jurisdiction by removal.

If petitioner was entitled to access to the United States District Court, it was manifestly either a plaintiff or a defendant in the civil action authorized by Iowa statutes. The Iowa statutes expressly made petitioner a defendant in that action. It is quite fundamental, of course, that state laws cannot operate to enlarge, restrict, or deny the *jurisdiction* of Federal tribunals.

This Court pointed out in *Mason City & Fort Dodge R.R. Co. vs. Boynton*, 204 U.S. 570, 51 L.Ed. 629, 27 S.Ct. 321, that the designation applied to a party to a civil action by state law was not controlling on the issue of removability; that the United States Courts must determine such questions for themselves as a matter of Federal law. There a non-resident whose property was condemned by a resident railroad corporation was held to be a defendant in the removal action, although by Iowa law he was designated as the plaintiff. Mr. Justice Holmes in speaking for this Court said:

> "It is quite conceivable that a state enactment might reverse the names which, for the purposes of removal, this court might think the proper ones to be applied. In condemnation proceedings the words 'plaintiff' and 'defendant' can be used only in an uncommon and liberal sense. The plaintiff complains of nothing. The defendant denies no past or threatened wrong. Both parties are actors: one to acquire title, the other to get as large pay as he can."

The rule of the *Boynton* case was considered in the later opinion of this Court in *Shamrock Oil and Gas Corp. vs. Sheets*, 313 U.S. 100, 85 L.Ed. 1214, wherein this Court speaking by Mr. Justice Stone said:

> "But at the outset it is to be noted that decision turns on the meaning of the removal statute and not upon the characterization of the suit or the parties to it by state statutes or decisions."

Further authorities might be cited but the pronouncements already quoted from, we believe, are sufficient to establish that the question of whether a party seeking relief in a Federal Court is to be regarded as a plaintiff or a defendant, in that court, is purely a question of Federal law, not governed by state statutes or decisions. Here it is to be noted that condemnor originated the proceeding before the administrative body; that it was seeking to acquire land found necessary to accomplish a project authorized by certificate of the Interstate Commerce Commission; that it was dissatisfied with the award made in the administrative proceeding and sought judicial review. We believe that under the circumstances petitioner was quite clearly a plaintiff in the action filed in the United States District Court. If the whole condemnation proceeding be viewed in its entirety, as the *Boynton* case indicates is proper, it is quite clear that petitioner is the plaintiff rather than the defendant.

If petitioner be not the plaintiff in the suit filed in the United States District Court, then manifestly it must be the defendant in that action. The *Boynton* case did not decide whether a railroad condemnor might be regarded as a defendant within the removal statutes, but only that the landowner, whose property was being taken was a defendant, notwithstanding he had instituted the action, and was designated by state law as the plaintiff.

IV.

A.

Rule 71A, Federal Rules of Civil Procedure, does not enlarge or affect the jurisdiction of the District Courts of the United States.

In the courts below it was urged by respondents that petitioner had a right to initiate its condemnation proceeding in the United States District Courts "under Rule 71A". This novel theory apparently was adopted by the majority of the Court of Appeals. It is perfectly apparent, of course, that Rule 71A in no manner affects the jurisdiction of the District Courts of the United States. This is true because it is a mere procedural rule promulgated by this Court pursuant to an act of congress. Furthermore, Rule 82 itself specifically provides that none of the Rules of Civil Procedure shall affect either jurisdiction or venue.

B.

The law of eminent domain is purely statutory. Therefore, unless the state, by its statutes, has provided for a judicial proceeding, or a civil action in eminent domain cases, the subject matter is not within the jurisdiction of the Federal Courts.

Counsel for respondents in the courts below urged that since Rule 71A provides the procedure to be followed in eminent domain cases in the United States District Courts, and, since Iowa had delegated to petitioner the substantive right to exercise the power of eminent domain, petitioner was thereby authorized to commence its eminent domain proceedings in the United States District Court. This contention, of course, would be sound if Federal law delegated to petitioner the right to appropriate property for railroad purposes. It would also be sound if Iowa statutes provided for a judicial proceeding in the courts of the state in eminent domain cases. But what respondents overlook is that in determining whether a given proceeding provided for by state law is judicial in character, consideration must be given to the fundamental nature of the proceeding, whether the inquiry is for the purpose of determining rights, duties and obligations between contending parties according to generally established rules of law, and the nature of the body before which the proceedings are to be conducted.

As this Court well knows in the past 75 years both state legislatures and the Congress have seen fit to enact a myriad of laws creating administrative boards and commissions which inquire into and regulate the activities of the people of the United States. Administrative boards have been created to administer workmen's compensation laws affecting employer's liability for personal injury to employees, to regulate relations between employer and employee, to regulate trade and industry, and to regulate public utility

corporations. Generally, the laws creating such boards and commissions provide for a judicial review of their decisions as the eminent domain statutes of Iowa provide for a trial *de novo* in the courts of the state. No one, of course, would contend that a proceeding for workmen's compensation under state law providing for an administrative board or commission could be instituted in the first instance in a United States District Court. But if a legislature, as in Louisiana, provides for a plan of workmen's compensation to be administered by a civil action in the courts of the state by judicial officers and other judicial proceedings, then, as the Eighth Circuit Court of Appeals itself held in *Texas Pipe Line Co. vs. Ware*, 15 F.2d 171, there is no sound reason to challenge the jurisdiction of the United States District Courts over such a case.

V.

The majority of the Court of Appeals has improperly construed the opinion of this Court in Mason City & Fort Dodge R.R. Co. vs. Boynton, 204 U.S. 570, 51 L.Ed. 629.

The motions to dismiss in the cases in which the railroad was designated as plaintiff and the motions to remand in the removal cases were heard at one time before the District Court. The cases were not otherwise consolidated either in the district or the appeals courts. The Court of Appeals held that under such circumstances the rule of *Deckert vs. Independence Shares Corp.*, 311 U.S. 282, 85 L.Ed. 189, should be followed, and that the propriety of the ruling of the court on the motion to remand was properly before it. We consented below to a determination of the questions presented on both appeals.

We have already pointed out in an earlier division of this brief that petitioner was entitled to invoke the jurisdiction of the United States District Court either as plaintiff

or defendant. It seems to us quite fundamental that if petitioner was properly denied access to the United States District Courts because it was not a proper party plaintiff, that then it necessarily follows that it had a right of removal from the state court to the Federal Court because it was a defendant in the proceeding. On the issue of removability the Court of Appeals held that the *Boynton* case was decisive. In this, we think the Court of Appeals was in error. In that case a non-resident owning certain lands in the City of Carroll, Iowa, appealed from the award of the sheriff's jury to a state district court, caused the case to be there docketed, and then filed his petition for removal and bond. The case was tried in the United States District Court and the railroad appealed from the judgment contending that the landowner had no right to remove. The Court of Appeals for the Eighth Circuit certified to this Court four questions which it asked this Court to answer. This Court found it necessary to answer only the first question certified which was, "Was the landowner a defendant within the removal statutes?" Mr. Justice Holmes, speaking for this Court, answered the question, "Yes", and found it unnecessary to go further.

Mr. Justice Holmes adverted to the dual character of the parties as actors in a condemnation proceeding and pointed out that the necessity of the railroad to acquire the property constituted the main spring of the action. He expressly said that it was unnecessary to determine whether the decision of the Iowa Supreme Court that the railroad was entitled to remove the action was right or wrong.

We believe that an analysis of Mr. Justice Holmes' opinion in the *Boynton* case does not support the conclusion of the Court of Appeals that it is absolutely decisive of the removability issue presented by this record. We feel that the majority of the Court of Appeals extended the *Boynton* case to unjustified lengths. If we consider that the railroad

had already acquired title and possession of the land involved by the administrative proceeding before the Iowa Sheriff, and consider the commencement of the civil action as the beginning of a lawsuit, then we think it quite apparent that the condemnor may well be both a nominal and an actual defendant in the case as held by District Judge Riley. The necessity of the railroad to acquire title referred to by Mr. Justice Holmes as the "mainspring of the proceeding" is no longer the paramount issue for determination. The condemnor, having acquired the property by the administrative proceeding, is in the position of defending against a claim for damages founded upon the lawful taking of the landowner's property. Viewed in this light, it is apparent that petitioner's status is that of a defendant. If this be true, removal to the United States District Court was proper and the decision of the Court of Appeals for the Eighth Circuit was erroneous.

VI.

Petitioner's procedure complied with all jurisdictional requirements of Rule 71A and the case was properly before the United States District Court.

In the courts below respondents urged that petitioner's procedure in instituting its original action failed to comply with the requirements of Rule 71A, Federal Rules of Civil Procedure. Neither of the courts below found it necessary to pass on this question, and it is significant that this contention was not made in the respondents' motion to dismiss the action. The contention advanced was that because the case was docketed as "Chicago, Rock Island and Pacific Railroad Company vs. Stude," rather than as "Chicago, Rock Island and Pacific Railroad Company vs. a certain described tract of land in Pottawattamie County, Iowa", and because a summons was issued to which was attached

a copy of the complaint, rather than the notice to appear and show cause referred to in Rule 71A, jurisdiction of the District Court was not properly invoked.

Of course, it would have been an entirely futile gesture for the petitioner to have served a notice of the character referred to in Rule 71A which is provided for in the event that the condemnation proceeding is initiated in the Federal Court. The complaint referred to the prior administrative proceedings before the sheriff. Since the hearing before a commission prescribed by state law had already been held, the United States District Court had no occasion to conduct further proceedings which would be required by subdivision (k) of Rule 71A had the condemnation been first instituted in the United States District Court.

In any event it affirmatively appears that the summons, together with the copy of the complaint, gave the landowner all information which he was entitled to have by the provisions of the Federal Rule. Petitioner's procedure met all jurisdictional requirements of Rule 71A and the contention of respondents, if renewed here, is manifestly without support.

CONCLUSION.

It is conceded that this cause presents a controversy wholly between citizens of different states involving more than $3,000; it is conceded that Iowa law provides in the first instance an administrative proceeding in condemnation cases, which, by statute, becomes a "civil action" when it reaches the courts for determination. It is the contention of respondents that petitioner should have instituted that administrative proceeding in the District Court of the United States and that, having followed the administrative procedure prescribed by state law, it is now barred from invoking the original jurisdiction of this Court. This view was

adopted by the two courts below. We think it plain that the decisions of the courts below have overlooked a very fundamental point; namely, that the District Courts of the United States can exercise jurisdiction only in civil actions, and only when the administrative procedure has been completed did the case become a civil action.

We submit that the judgment of the District Court dismissing petitioner's complaint as plaintiff was wrong, and that in affirming this judgment the Court of Appeals was in error. But if the judgment of dismissal be correct, if for any reason petitioner was not a proper party plaintiff, then petitioner's status was that of a defendant entitled to reach the District Court by removal.

The question is of major importance, not only with respect to the issue of the law of eminent domain which is here presented and which arises under the statutes of a large number of states, but also because it involves the relationship of state administrative bodies and the District Courts of the United States. The decisions of the courts below have denied to the petitioner rights guaranteed by the statutes of the United States. The decision of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX.

(All section references are to the Code of Iowa, 1950.)

Section 471.6 Railways. Any railway, incorporated under the laws of the United States or of any state thereof, may acquire by condemnation or otherwise so much real estate as may be necessary for the location, construction, and convenient use of its railway. * * *

Section 472.3. Application for condemnation. Such proceedings shall be instituted by a written application filed with the sheriff of the county in which the land sought to be condemned is located. Said application shall set forth: * * *

Section 472.4. Commission to assess damages. The sheriff shall thereupon, except as otherwise provided, appoint six resident freeholders of his county, none of whom shall be interested in the same or a like question, who shall constitute a commission to assess damages to all real estate desired by the applicant and located in the county.

Section 472.8 Notice of assessment. The applicant, or the owner or any lienholder or encumbrancer of any land described in the application, may, at any time after the appointment of the commissioners, have the damages to the lands of any such owner assessed by giving the other party, if a resident of this state, ten days notice, in writing. Such notice shall specify the day and the hour when the commissioners will view the premises, and be served in the same manner as original notices.

Section 472.14. Appraisement—report. The Commissioners shall, at the time fixed in the aforesaid notices, view, if necessary, the land sought to be condemned and assess the damages which the owner will sustain by reason of the appropriation, and file their written report with the

sheriff. The appraisement and return may be in parcels larger than forty acres belonging to one person and lying in one tract, unless the agent or attorney for the applicant, or the commissioners, have actual knowledge that the tract does not belong wholly to the person in whose name it appears of record. In case of such knowledge the appraisement shall be made of the different portions, as they are known to be owned.

Section 472.17. When appraisement final. The appraisement of damages returned by the commissioners shall be final unless appealed from.

Section 472.18. Appeal. Any party interested may, within thirty days after the assessment is made, appeal therefrom to the district court, by giving the adverse party, his agent or attorney, and the sheriff, written notice that such appeal has been taken.

Section 472.21. Appeals—how docketed and tried. The appeal shall be docketed in the name of the owner of the land, or of the party otherwise interested and appealing, as plaintiff, and in the name of the applicant for condemnation as defendant, and be tried as in an action by ordinary proceedings.

Section 472.22 Pleadings on appeal. A written petition shall be filed by the plaintiff on or before the first day of the term to which the appeal is taken, stating specifically the items of damage and the amount thereof. The defendant shall file a written answer to plaintiff's petition, or such other pleadings as may be proper.

Section 472.23. Question determined. On the trial of the appeal, no judgment shall be rendered except for costs, but the amount of damages shall be ascertained and entered of record.

Section 472.25 Right to take possession of lands. Upon the filing of the commissioners' report with the sheriff,

the applicant may deposit with the sheriff the amount assessed in favor of a claimant, and thereupon the applicant shall, except otherwise provided, have the right to take possession of the land condemned and proceed with the improvement. No appeal from said assessment shall affect such right, except as otherwise provided.

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IN THE
Supreme Court of the United States

No. 209 of 1953
CIVIL

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Petitioner*,

vs.

ARCHIE C. STUDE, WILLIAM LUMPKIN and POTTAWATTAMIE COUNTY, IOWA, *Respondents*.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Petitioner*,

vs.

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vs.

ARCHIE C. STUDE and WILLIAM LUMPKIN, *Respondents*.

RESPONDENTS' BRIEF RESISTING PETITION FOR CERTIORARI

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Petitioner has not been denied access to the federal courts since petitioner failed to commence the action initially in the federal court, but sought to appeal from a final award under state procedure.

II. ____ 21

The decision of the court below is in harmony with decisions of this court and the decisions in other circuits.

III. ____ 26

No substantial questions of general interest are presented as to the scope and proper application of Rule 71 A, Federal Rules of Civil Procedure.

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Petitioner is precluded by previous decisions of this court from removing the state court appeal to the federal court.

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RESPONDENTS' BRIEF RESISTING PETITION FOR CERTIORARI

STATEMENT OF THE CASE

Chapter 471 of the Code of Iowa of 1950 entitled "EMINENT DOMAIN" relates exclusively to the right to condemn land in the State of Iowa. Among those granted that right of condemnation are railroads which have satisfied the conditions imposed by the sections of the statutes applicable thereto. (Code Iowa 1950, §§ 471.6-471.10, inclusive.) The specific sections applicable herein provide:

"471.6. *Railways.* Any railway, incorporated under the laws of the United States or of any state thereof, may acquire by condemnation or otherwise so much real estate as may be necessary for the location, construction, and convenient use of its railway. Such acquisition shall carry the right to use for the construction and repair of said railway and its appurtenances any earth, gravel, stone, timber, or other material, on or from the land so taken.

"471.9. *Additional purposes.* Any such corporation owning, operating, or constructing a railway may, by condemnation or otherwise, acquire lands for the following additional purposes:

* * * * *

"3. For additional or new right of way for constructing double track, reducing or straightening curves, changing grades, shortening or relocating portions of the line, and for excavations, embankments, or places for depositing waste earth.

* * * * *

"471.10. *Finding by commerce commission.* The company before instituting condemnation proceedings under section 471.9, shall apply in writing to the Iowa state commerce commission, for permission to so condemn. Said commission shall give notice to the landowner, and examine into the matter, and report by certificate to the clerk of the district court in the county in which the land is situated, the amount and description of the additional lands necessary for such purposes, present and prospective, of such company; whereupon the company shall have power to condemn the lands so certified by the commission."

By an entirely separate chapter the procedure for condemnation in Iowa to enforce in the state courts the substantive rights of condemnation granted by Chapter 471

is set out. This is Chapter 472 of the Iowa Code of 1950 entitled, "PROCEDURE UNDER POWER OF EMINENT DOMAIN." This procedural chapter of the Iowa Code is applicable not only to railroads seeking to condemn by state proceedings but also to other condemnors. Thus Code of Iowa 1950, § 472.1, provides:

> "The procedure for the condemnation of private property for works of internal improvement, and for other public uses and purposes, unless and except as otherwise provided by law, shall be in accordance with the provisions of this chapter."

The procedure to be followed in a condemnation case in the United States courts is prescribed by the Federal Rules of Civil Procedure, Rule 71A, 28 U. S. C. A., and subdivision (k) of Rule 71A specifically provides that the rule governs in actions involving the exercise of the power of eminent domain under the law of a state and that if the state law provides for trial of any issue by jury or for trial of the issue of compensation by jury or commission, or both, that provision shall be followed.

Alleging that theretofore it had been authorized by the Interstate Commerce Commission and had been granted authority to condemn by the Iowa State Commerce Commission, the Chicago, Rock Island & Pacific Railroad Company (hereinafter referred to as petitioner) on January 18, 1952, instituted condemnation proceedings before the Sheriff of Pottawattamie County, Iowa, in accordance with the provisions of Chapter 472, Code of Iowa, 1950, and filed a written application for condemnation of the private property of various persons, including land owned by Archie C. Stude and leased by William Lumpkin, respondents herein (R. 5-7). The sheriff appointed six

resident freeholders of the county as a commission to assess and appraise damages (R-7) and a notice of hearing before the commissioners was served on the landowners (R. 7, 9). A hearing was had before the Commissioners and they made their awards, including an award to Archie C. Stude in the amount of Twenty-three Thousand Eight Hundred Eighty-eight and 60/100ths Dollars ($23,888.60) and an award to William Lumpkin in the amount of One Thousand and no/100ths Dollars ($1,000.00) (R. 7, 8).

The petitioner deposited the awards with the sheriff on February 23, 1952 (R. 18) and took possession of the land condemned under the procedure set forth in Section 472.25 of the Code of Iowa, 1950, which provides:

> "*Right to take possession of lands.* Upon the filing of the commissioners' report with the sheriff, the applicant may deposit with the sheriff the amount assessed in favor of a claimant, and thereupon the applicant shall, except as otherwise provided, have the right to take possession of the land condemned and proceed with the improvement. No appeal from said assessment shall affect such right, except as otherwise provided."

Under Iowa procedure, Chapter 472, Code of Iowa, 1950, the following sections provide that the award is final unless an appeal is taken:

> "Section 472.17. When appraisement final. The appraisement of damages returned by the commissioners shall be final unless appealed from.
>
> "Section 472.18. Appeal. Any party interested may, within thirty days after the assessment is made, appeal therefrom to the district court, by giving the

adverse party, his agent or attorney, and the sheriff, written notice that such appeal has been taken."

On March 6, 1952, petitioner attempted to appeal from the award of the sheriff's commissioners directly to the Federal Court by serving a "Notice of Appeal from Assessment of Damages" upon respondents (R. 4), and docketing a complaint in the United States District Court (R. 4), and causing an ordinary summons to be issued and served upon the landowners (R. 9).

Thereafter and on March 11, 1952, the petitioner served a Notice of Appeal to the appropriate State Court from the **same award** by the sheriff's commissioners (R. 47), and filed a petition of removal to the United States District Court (R. 48).

The United States District Court for the Southern District of Iowa, Western Division, sustained respondents' motion to dismiss the complaint and overruled respondents' motion to remand the removal case (R. 37-39; 107 F. Supp. 895).

The United States Court of Appeals for the Eighth Circuit affirmed the dismissal of the attempted direct appeal to the United States District Court and reversed the United States District Court's decision overruling the motion to remand, with directions to grant the motion and remand the cause (R. 87, 88; 204 Fed. 2d 116).

The Court of Appeals held that no right of appeal from the commissioners' award to the United States District Court is provided for in either the State Code or Rule 71A of the Federal Rules of Civil Procedure, and that the right of petitioner to initiate the proceedings

in the United States District Court was not before the court "for the simple reason that it did not do so * * *" (R. 86, 204 Fed. 122). As respects the removal, the Court of Appeals held that the decision of this court in *Mason City and Fort Dodge R. Co. v. Boynton*, 204 U. S. 570, 51 L. Ed. 629, 27 S. Ct. 321, was controlling since that decision involved the right of removal by parties to a condemnation proceeding commenced under the procedural law of the State of Iowa. The Boynton case, supra, held that in an Iowa condemnation case the landowner is the defendant for purposes of removal. Therefore, the Court of Appeals held that the Motion to Remand should have been sustained.

Thereafter petitioner filed a petition for rehearing with the Court of Appeals (R. 89-100) which was denied (R. 100-108; 204 F. 2d 954).

In the opinion of the Court of Appeals denying the petition for rehearing the court emphasizes that petitioner strictly followed the Iowa procedure for initiating the condemnation suit in the Iowa State courts and that no complaint was filed in the United States District Court until after an appeal was taken from the commissioners' award as required by the Iowa Procedural Statute. The court further held that petitioner did not attempt to invoke the original jurisdiction of the Federal Court under Rule 71A of the Federal Rules of Civil Procedure (R. 101-107, incl.; 204 F. 2d 954).

SUMMARY OF ARGUMENT

I.

After obtaining the substantive right to condemn, petitioner had the choice of commencing the action in the state or federal courts. Petitioner followed state procedure until a final award was entered and then attempted to appeal directly to the Federal Court. Since petitioner failed to commence the action in Federal Court, the petitioner has not been denied access to the federal courts.

Franzen v. Chicago, Milwaukee & St. Paul Ry. Co., 7 Cir., 278 Fed. 370.

Central Neb. Public Power & Irr. Dist. v. Harrison, 8 Cir., 127 F. 2d 588.

United States v. Dillman, 5 Cir., 146 F. 2d 572.

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Federal Rules of Civil Procedure, Rule 71A, 28 U. S. C. A., pocket part.

Notes of the Advisory Committee to Rule 71A, Federal Rules of Civil Procedure.

II.

The decision of the court below is in harmony with decisions of this court and the decisions in other circuits. Other circuits have uniformly held that under the decisions of this court a condemnation proceeding is a civil action which may be commenced under the diversity jurisdiction of the federal courts. Federal courts have also uniformly appointed commissioners or viewers provided under state procedures. The United States District Courts have no appellate jurisdiction from state proceedings.

Norton v. Larney, 266 U. S. 511, 69 L. Ed. 413, 45 S. Ct. 145.

Young v. Main, 8 Cir., 72 F. 2d 640.

Ward v. Morrow, 8 Cir., 15 F. Supp 2d 660.

McNutt v. McHenry Chevrolet Co., 298 U. S. 178, 80 L. Ed. 1135, 56 S. Ct. 780.

Franzen v. Chicago, Milwaukee & St. Paul Ry. Co., 7 Cir., 278 Fed. 370.

Williams Livestock Company v. Delaware L. & W. R. Co., (D. C. Pa.), 285 Fed. 795.

Burford v. Sun Oil Co., et al, 319 U. S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424.

III.

Petitioner did not commence its action in the federal courts following the simple procedure of Rule 71A. In-

stead petitioner followed state procedure until becoming dissatisfied with the award, and then attempted a direct review of the award in the Federal Court. This unusual and unprecedented procedure attempted by the petitioner because of its own delay does not give rise to any question of general interest.

54 Am. Jur. 874, Sec. 236.

National Labor Relations Board v. Pittsburgh SS Company, 340 U. S. 498, 95 L. Ed. 479, 71 S. Ct. 453.

IV.

This Court previously held in the case of *Mason City and Ft. Dodge Ry. Co. v. Boynton*, 197, 204 U. S. 570, 51 L. Ed. 629, 27 S. Ct. 321, that under an Iowa condemnation proceeding the landowner is the defendant and the party entitled to remove under the removal statute. This case has been uniformly approved and followed and no reason is given for its reversal. Hence petitioner was not entitled to remove.

Shamrock Oil & Gas Corporation v. Sheets, 313 U. S. 100, 85 L. Ed. 1214, 61 S. Ct. 868.

Kloeb v. Armour & Company, 311 U. S. 199, 85 L Ed. 124, 61 S. Ct. 213.

Mason City and Ft. Dodge Railroad Company v. Boynton, 1907, 204 U. S. 570, 51 L. Ed. 629, 27 S. Ct. 321.

28 U. S. C. A., Sec. 1441 (a).

ARGUMENT

I.

Petitioner has not been denied access to the federal courts since petitioner failed to commence the action initially in the federal court, but sought to appeal from a final award under state procedure.

The principal contention of petitioner is that by the decisions below it has been denied access to the United States courts in proceedings properly cognizable therein. Respondents insist that petitioner itself failed to invoke the jurisdiction of the United States courts. It is respondents' position that there is no appeal to United States courts from state rulings, either administrative or judicial; that while initially petitioner could choose its forum it could not cut across from state to federal jurisdiction after the sheriff's commissioners made their awards and petitioner deposited the amounts thereof with the sheriff; and that petitioner, being the plaintiff and not the defendant in the state proceedings it instituted, could not remove those proceedings to the United States courts.

The petitioner herein commenced these condemnation proceedings under Iowa procedural laws. Apparently being dissatisfied with the award of the sheriff's commissioners, which under Iowa procedure is a final award unless appealed from, petitioner attempted by two different methods to obtain a review of the award in the federal courts. The petitioner attempted first to appeal directly to the United States District Court and then attempted to appeal to the State Court and remove the action. Respondents respectfully submit that petitioner can-

not appeal from the commissioners' award directly to the Federal Court; and that if it had desired to bring the action before the federal courts, it should have commenced the action intially in the United States District Court following the procedure in the federal courts set forth in Rule 71A of the Federal Rules of Civil Procedure, 28 U. S. C. A.

The petitioner contends that under Iowa procedure the proceedings before the sheriff are purely administrative and under Iowa procedure there is no "civil action" until an appeal is taken from the award to the state court. If by this the petitioner means that there is no "civil action" pending in the state court prior to the award, respondents do not dispute the contention. But Iowa procedure cannot affect the method of commencing an action in the federal courts. In fact, petitioner itself argues in Division II B of its brief that the Iowa legislature could not by procedural laws affect the jurisdiction of the federal courts. Yet petitioner now claims that in order to proceed in federal court it was first necessary to follow the Iowa procedure until a final award was entered by the sheriff's commissioners and then to appeal to the federal court.

The petitioner's contention that it has been denied access to the federal courts in the instant proceedings is grounded on the false postulate that it had no cause of action in the United States Court until after it exhausted the administrative remedies provided by the state procedural statutes. In this, petitioner is clearly in error. In our Statement of the Case we have set out the pertinent portions of the applicable Iowa statutes. It will be noted that Chapter 471 of the Iowa Code of 1950, re-

lates to the power to condemn and prescribes all the conditions precedent to that right. The right is extended to the State of Iowa by § 471.1, to the United States Government by § 471.2, to other entities by § 471.4 and to railroads by § 471.6, et seq. Under § 471.10, a railroad, before instituting condemnation proceedings under § 471.9, shall apply in writing to the Iowa State Commerce Commission for permission to condemn. The Commission must give notice to the landowner and examine into the matter and report by certificate to the Clerk of the District Court in the county in which the land is situated, the amount and description of the additional land necessary for railroad use. The statute then provides:

> "whereupon the company shall have the power to condemn the lands so certified by the Commission."

We respectfully submit that the petitioner having satisfied that requirement, and having received the authority of the Iowa State Commerce Commission to condemn, could immediately institute the proceeding either under state or federal procedure. But petitioner could not start under state practice before the sheriff and then cut across to the federal court by way of an appeal from the award of the sheriff's commissioners. The power to condemn became absolute when petitioner received the approval of the Iowa State Commerce Commission. There is no requirement, as a condition to the right to condemn under Iowa law, that the condemnor proceed before the sheriff as set forth in the procedural chapter of the Iowa Code. It was perfectly proper for petitioner to file the proceeding before the sheriff, but that was not a federal court condemnation proceeding; it was a state proceeding and that is all.

We respectfully submit that the petitioner is in error in contending that it necessarily instituted the proceedings in the sheriff's office. When those proceedings were instituted, petitioner had the absolute right to condemn —a substantive right granted by the State of Iowa. But that substantive right was enforceable either in federal court or in state court. If the petitioner desired to proceed in the federal court, it might have done so at the very moment that it received the sanction of the Interstate Commerce Commission and the State Commerce Commission of Iowa. There was no other condition attached to the power to condemn. Proceedings before the sheriff's commissioners are merely the first step in a state condemnation proceeding.

There is no authority in either state or federal law for the hybrid proceeding attempted by petitioner in this case, part state and part federal in nature.

Rule 71A of the Federal Rules of Civil Procedure was adopted in 1951 to govern exclusively the procedure in the federal courts for condemnation of real property under the power of eminent domain.

Petitioner did not follow the procedure set forth in Rule 71A, and we respectfully submit that the obvious and only method of invoking federal court jurisdiction of condemnation proceedings is to commence the action in the federal court as provided in Rule 71A. Subdivision (k) of Rule 71A specifically relates to condemnation under state substantive law, as follows:

> *(k) Condemnation under a State's Power of Eminent Domain.* The practice as herein prescribed governs in actions involving the exercise of the power

of eminent domain under the law of a state, provided that if the state law makes provisions for trial of any issue by jury, or for trial of the issue of compensation by jury or commission or both, that provision shall be followed."

Thus 71A (k) provides that condemnation proceedings under state substantive law, if brought in federal court, are governed by Rule 71A, and in such a case if the state law makes provision for trial of any issue by jury, or trial of the issue of compensation by jury or commission or both, that provision shall be followed in the proceeding brought in the United States Court.

Even prior to Rule 71A the federal courts under the conformity statutes followed as closely as possible in federal court state rules respecting commissioners by appointing such commissioners in diversity condemnation cases. *Frasses v. Chicago, Milwaukee & St. Paul Ry. Co.*, 7 Cir., 278 Fed. 370. And in condemnation cases involving the United States as plaintiff the district courts under the conformity acts either appointed commissioners itself or ordered the United States marshal to do so. See

Central Neb. Public Power & Irr. Dist. v. Harrison, 8 Cir., 127 F. 2d 588.

United States v. Dillman, 5 Cir., 146 F. 2d 572.

United States v. Federal Land Bank of St. Paul, 8 Cir., 127 F. 2d 505.

United States v. 16,572 acres of land, (D. C. S. D., Texas), 49 F. Supp. 555.

United States v. 18,236 acres of land in Franklin, Pennsylvania, 63 F. Supp. 665.

United States v. 1010.8 acres of land in Sussex County, Delaware, 77 Fed. Supp. 529.

United States v. 17,280 acres of land, more or less, situated in Saunders County, Nebraska, 47 F. Supp. 267.

United States v. 250 acres of land in Nueces County, Texas, 43 F. Supp. 937.

United States v. 266.25 acres of land in Charleston County, South Carolina, 43 F. Supp. 633.

Petitioner neither contends nor cites authority to the effect that the federal court could not have appointed commissioners. Furthermore, Rule 71A (k) specifically provides for following state law as to appointment of commissioners. If they would be appointed in a state proceeding, they would likewise be appointed in federal proceedings. But in such a case they would be appointed by the federal courts and under federal supervision.

The proper method for petitioner to have followed to commence the action in federal court would have been the simple procedure set forth in Rule 71A; that of instituting the proceeding in the United States District Court and requesting that commissioners be appointed by the United States court, or by the United States marshal under order of the court. If the award should prove unsatisfactory the case would then be heard before a federal court jury. Instead, petitioner followed state procedure to the point where a final award was made from which petitioner could, under state procedural statutes, appeal to the state courts, but certainly could not appeal to the federal courts.

Under petitioner's theory the procedure in federal courts would vary from state to state depending upon the procedure in each state. As heretofore pointed out, state

procedure cannot affect the procedure in the federal courts. The fact that under state practice a matter is first decided in an administrative proceeding and no "civil action" is pending in the state court until an appeal is taken to that court, does not mean that that same substantive right cannot be determined in the federal court by filing a civil action therein. And in the United States Court federal not state procedure controls. Furthermore the principal reason for the adoption of Rule 71A was to establish uniformity in procedure in federal courts in condemnation cases. The following excerpts from the Notes of the Advisory Committee on the Federal Rules regarding Rule 71A show that the purpose of the rule was to develop a uniform procedure to replace the previous practice under the conformity system which the committee described as "atrocious":

> "The Advisory Committee have given more time to this rule, including time required for conferences with the Department of Justice to hear statements of its representatives, than has been required by any other rule. The rule may not be perfect but if faults develop in practice they may be promptly cured. Certainly the present conformity system is atrocious." 28 U. S. C. A. following Rule 71 A, pocket part, page 98.

> "Rule 71 A affords a uniform procedure for all cases of condemnation invoking the national power of eminent domain, and, to the extent stated in subdivision (k), for cases invoking a state's power of eminent domain; and supplants all statutes prescribing a different procedure." 28 U. S. C. A. following Rule 71 A, pocket part, pages 102, 103.

> "*Note to Subdivision (h).* This subdivision prescribes the method for determining the issue of just

compensation in cases involving the federal power of eminent domain. The method of jury trial provided by subdivision (h) will normally apply in cases involving the state power by virtue of subdivision (k)." 28 U. S. C. A. following Rule 71 A, pocket part, page 104.

"*Note to Subdivision (k).* While the overwhelming number of cases that will be brought in the federal courts under this rule will be actions involving the federal power of eminent domain, a small percentage of cases may be instituted in the federal court or removed thereto on the basis of diversity or alienage which will involve the power of eminent domain under the law of a state. See Boom Co. v. Patterson, 1878, 98 U. S. 403, 25 L. Ed. 206; Searl v. School District No. 2, 1888, 8 S. Ct. 460, 124 U. S. 197, 31 L. Ed. 415; Madisonville Traction Co. v. Saint Bernard Mining Co., 1905, 25 S. Ct. 251, 196 U. S. 239, 49 L. Ed. 462. In the Madisonville case, and in cases cited therein, it has been held that condemnation actions brought by state corporations in the exercise of a power delegated by the state might be governed by procedure prescribed by the laws of the United States, whether the cases were begun in or removed to the federal court. See, also, Franzen v. Chicago, M. & St. P. Ry. Co., C. C. A. 7th, 1921, 278 F. 370, 372.

"Any condition affecting the substantial right of a litigant attached by state law is to be observed and enforced, such as making a deposit in court where the power of eminent domain is conditioned upon so doing. (See also subdivision (j)). Subject to this quelification, subdivision (k) provides that in cases involving the state power of eminent domain, the practice prescribed by other subdivisions of Rule 71 A shall govern." 28 U. S. C. A. following Rule 71 A, pocket part, page 105.

The rulings of the Court of Appeals do not deprive a non-resident condemnor of access to the federal courts.

The petitioner simply did not invoke the jurisdiction of such courts. It followed state procedure and subsequently sought to bring the action before the federal court by way of appeal. The effect of the procedure adopted by the petitioner would result in a system more "atrocious" than the previous conformity system and would completely ignore the procedure set forth in Rule 71A. Petitioner failed to follow the mandate of Rule 71A as to the contents of the complaint, the notice given or the heading of the complaint.

Furthermore, the deposit of the award made by petitioner as required by Iowa practice in order to obtain possession of the land is being held by the Iowa sheriff who is neither **an officer of the Federal Court nor a party to the action.** Both the Court of Appeals and the District Court held that the petitioner failed to commence the acion in the Federal Court as provided by Rule 71A and that the United States District Court has no jurisdiction of an attempted appeal from a final award under state procedure. The opinion of the District Court in the decision below points out:

> "The effect of the rule (Rule 71A) therefore, as I interpret it, is to provide for a condemnor undertaking to exercise the power of eminent domain under the law of a state, the means to proceed in this court in the first instance if jurisdiction resides here under Sec. 1332, Tit. 28, U. S. C. To hold otherwise would have the effect of depriving a citizen of another state of rights conferred upon him by Sec. 1332 to commence an action here. It would be equivalent to amending Sec. 1332 by inserting what we have italized so that it would read thus: 'The district courts shall have original jurisdiction of all civil suits *except those involving the exercise of the power of*

eminent domain where the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and is between: (1) Citizens of different states.'

* * * * *

"One having the right to come here initially in condemnation proceedings surely cannot go partly down the road of the state procedure and then cut across from the sheriff's commissioners' award to this court. There is no such path defined. It was said earlier in Division I that there is no authority for such action. It is perhaps better said that Rule 71A is authority *against* such action. * * *" (R. 34, 35; 107 F. Supp. 905.)

The Court of Appeals for the Eighth Circuit in its decision answered petitioner's contention as follows:

"The short and simple answer to the Rock Island's contention that it had the right of direct appeal from the commissioners' award to the federal court is that there was no right of appeal from the commissioners' award to the federal court provided for in the state Code and Rule 71A confers none. No such right exists.

* * * * *

"The question of whether the Rock Island could have initiated the proceedings in the United States District Court is not before us for the simple reason that it did not do so and hence the propriety of such action is not presented. We express no opinion on that subject." (R. 82, 86; 204 Fed. 120, 122.)

The majority opinion of the Court of Appeals denying the petition for rehearing also made clear the fact that petitioner did not attempt to commence the action initially in the federal court. The court states:

"The complaint filed in the United States District Court cannot be treated as having created an original action in the federal court. It is correct, as the Rock Island contends, that the Iowa legislature could not restrict or enlarge the jurisdiction of the federal court by procedural statutes, and we must not be understood to have so held. It may well be that if this action had been commenced in the United States District Court that court would have had jurisdiction. But actions are not initiated in the federal courts by filing with a sheriff a request that he appoint commissioners to assess damages. It might also be that if the action had been initiated in the federal court that that court would have followed the Iowa procedure under Rule 71A. But it was not asked to do so And we do not pass upon that question because it, like the question of whether the action could have been initiated in the federal court, is not in the case." (R. 102, 103; 204 F. 2d 954, 955.)

Petitioner herein did not attempt to commence the action in the Federal Court, but waited until a final award was made under state procedure, then attempted to invoke the jurisdiction of the Federal Court by way of appeal. If the procedure attempted to be followed by petitioner herein were held to invoke federal jurisdiction, we respectfully suggest that Rule 71A is less than useless. Furthermore, if the procedure followed by petitioner was right, the procedure followed in innumerable cases, such as those cited on pages 14, 15, supra, was improper.

The power to condemn was unconditionally granted to petitioner at the moment it received the authorization of the Iowa State Commerce Commission. That power was not further conditioned on bringing proceeding before the sheriff. Having the power to condemn, petitioner had a

choice of forum—state or federal. That it chose state procedure to enforce its substantive right of condemnation was not the fault of respondents. Petitioner has not been denied access to the federal courts. It has merely failed to invoke that jurisdiction.

II.

The decision of the court below is in harmony with decisions of this court and the decisions in other circuits.

After the petitioner attempted a direct appeal from the award of the sheriff's commissioners to the United States District Court the landowners filed a Motion to Dismiss the cause of action on the ground that the District Court was without jurisdiction. Of course, the petitioner had the burden of showing the jurisdiction of the federal court. See *Norton v. Larney*, 266 U. S. 511, 69 L. Ed. 413, 45 S. Ct. 145; *Young v. Main*, 8 Cir., 72 F. 2d 640; *Ward v. Morrow*, 8 Cir., 15 F. 2d 660; *McNutt v. McHenry Chevrolet Co.*, 298 U. S. 178, 80 L. Ed. 1135, 56 S. Ct. 780. However, the petitioner cited no cases showing any appellate jurisdiction in the United States District Court to consider such an appeal and cited no case involving any similar situation.

The ultimate question is whether petitioner, after having obtained the substantive right to condemn, could follow state procedure until after an award was entered and then appeal directly to the federal court. Assuming that the federal court has jurisdiction of condemnation cases, there is also the incidental question of how a condemnation action should be commenced in the United States District Courts in Iowa.

First of all, petitioner contends that it was required to follow the state procedure until after an award was entered. No authorities are cited for this proposition and, in fact, in Division II-B of its brief, petitioner argues that jurisdiction of a federal court "cannot be restricted, enlarged or diminished by reason of state procedural statutes." Yet petitioner now contends that the state procedure for an award by a sheriff's commission must be followed before a federal court would have jurisdiction.

As heretofore pointed out, the petitioner had the substantive right to condemn after being authorized by the State Commerce Commission of Iowa. We have also shown that there was no attempt made by the State Legislature to restrict or limit the exercise of this substantive right to state courts or proceedings. As we have pointed out, petitioner itself argues that the state could not restrict the substantive right, yet that is exactly what petitioner contends in other portions of its brief.

The petitioner has cited no cases holding that after obtaining the substantive right to condemn property a district court would not have initial jurisdiction of the action. That a condemnation proceeding is a civil action within the jurisdiction of the federal courts is settled in the case of *Franzen v. Chicago, Milwaukee & St. Paul Ry. Co.*, 7 Cir., 278 Fed. 370. This case affirmatively shows that even before Rule 71A of the Federal Rules of Civil Procedure the federal courts had jurisdiction in diversity condemnation cases. In that case it was held that a condemnation proceeding authorized by the law of Illinois could be instituted in the federal court, as against the

contention that the state court alone was authorized by the Illinois statute to try the issues arising out of the condemnation proceeding considered. The court stated in the course of its opinion, l. c. 278 F. 371:

> "But defendants contend that the federal court cannot maintain an action to condemn; the state court alone being authorized by the Illinois statute to try issues arising out of such proceedings. A very interesting and, we may add, able brief is submitted in support of this contention. But the question is closed by the decisions of the Supreme Court. Miss., etc., River Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206; Searl v. School Dist., 124 U. S. 197, 8 Sup. Ct. 460, 31 L. Ed. 415; Madisonville Traction Co. v. St. Bernard Mining Co., 196 U. S. 239, 25 Sup. Ct. 251, 49 L. Ed. 462; Mason City & Ft. Dodge Ry. Co. v. Boynton, 204 U. S. 570, 27 Sup. Ct. 321, 51 L. Ed. 629; Kohl v. United States, 91 U. S. 367, 23 L Ed. 449.
>
> "10 Ruling Case Law, 207, we think, correctly announces the law of these decisions to be:
>
> > "'A judicial proceeding to take land by eminent domain and ascertain compensation therefor is a suit at common law within the meaning of the federal Judiciary Act; and when the requisite diversity of citizenship exists such a suit may be brought in or transferred to the federal District Court of the district in which the land lies.'
>
> "See, also, Nichols on Law of Eminent Domain (1917 Ed.), pp. 1040, 1041."

Furthermore, we have heretofore cited cases showing that the federal courts can appoint commissioners provided by state laws and the petitioner has cited no cases showing that a federal court could not appoint

commissioners. The commissioners provided by state law were appointed by the federal court in the *Franzen* case, supra, and viewers under state procedure were also appointed by the Federal Court in *Williams Livestock Company v. Delaware L. & W. R. Co.*, (D. C. Pa.) 285 Fed. 795. Under the Pennsylvania statute there involved, the right to condemn arose after depositing a bond (in this case the right arose upon securing permission of the Iowa State Commerce Commission under Code Iowa, 1950. § 471.10). In the Pennsylvania case the first step in condemnation was appointment of viewers (here it is appointment of commissioners). In the *Williams Livestock Co.* case it was held by the United States District Court for the Middle District of Pennsylvania that the provisions of the Pennsylvania Statute requiring the viewers appointed to assess damages for land condemned, on a petition filed in a court "of this Commonwealth" to be chosen from a board selected by the Court of Common Pleas of the county, and that they shall meet at the place designated by such court, and be governed by its rules and orders and report to it, **were not applicable when the petition was filed in the federal court** which was required to conform to the state court practice as near as might be. The court held that the viewers would be appointed by the court and that the court would not make its selection of viewers from the county board appointed by the judge of the Court of Common Pleas of the county. The court said that the state statute did not attempt to limit the action of the federal court and that if it did so, the selection and appointment of the viewers would be that of the state and not of the federal court.

The *Williams and Franzen* cases further show that federal courts may take jurisdiction in condemnation proceedings even though they do not exactly follow the state procedure. In the *Williams* case the manner of the selection of the viewers under state law was not followed to the letter and in the *Franzen* case the state provisions for selecting jurors from freeholders of a certain county were not followed.

However, the important point of these cases is that the state procedural matters do not affect the jurisdiction of the federal courts. We have also heretofore cited many cases involving condemnations in the federal courts under federal statutes involving the United States in which the federal courts under the Conformity Acts appointed commissioners provided under state procedure.

The case of *Burford v. Sun Oil Co., et al*, 319 U. S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424, cited by petitioner, involved entirely different principles which are not applicable here. In that case an action was commenced in equity in the federal court to set aside an order of a Texas commission granting a permit to drill oil wells. A comparable situation in this case would have been presented if an equitable action had been commenced to set aside the order of the Iowa State Commerce Commission authorizing petitioner to condemn the lands here involved. The case involved herein is an appeal from an award and does not attempt to set aside the award. This distinction is set forth in the *Burford case* as follows:

> "There is some argument that the action is an 'appeal' from the State Commission to the federal court since an appeal to a State Court can be taken

under relevant Texas statutes; but of course the Texas legislature may not make a federal district court, a court of original jurisdiction, into an appellate tribunal or otherwise expand its jurisdiction, and the Circuit Court of Appeals in its decision correctly viewed this as a simple proceeding in equity to enjoin the enforcement of the Commission's order." (63 S. Ct. at page 1099.)

Thus in the *Burford case*, supra, the action was commenced in equity to set aside an order of the State Commission on the ground that the order was a denial of due process of law. The instant case involves merely a review of the amount of the award by the sheriff's commission and is in no sense a separate cause of action to set aside an order but is merely a direct appeal seeking a review of the order.

Therefore, it appears that after the petitioner obtained the substantive right to condemn, it had the choice of proceeding initially in the state or federal forum as shown by the above authorities and the petitioner cites no authority for an appeal from the state award to the federal court.

III.

No substantial questions of general interest are presented as to the scope and proper application of Rule 71A, Federal Rules of Civil Procedure.

It is manifest under Rule 35 (5) of the rules of the United States Supreme Court that certiorari will be granted only if there are special and important reasons therefor and in cases of gravity and importance. 54 Am. Jur. 874, Sec. 236 (Citing cases.)

As pointed out by this court in *National Labor Relations Board v. Pittsburgh SS Company*, 340 U. S. 498, 95 L. Ed. 479, 71 S. Ct. 453, certiorari is granted only in cases involving principles, the settlement of which is of importance to the public as distinguished from the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Courts of Appeals.

No conflict exists in the present instance and Rule 71A of the Federal Rules of Civil Procedure is clear upon its face as to the procedure to be followed by condemnors seeking to invoke the jurisdiction of the federal court.

The procedure to be followed under Rule 71A is clearly delineated. Subdivision (k) of this rule specifically embraces actions arising under and by virtue of the granting of the right to condemn under state statute.

The petitioner did not follow the procedure there prescribed and did not initiate its action in the federal court. Instead petitioner waited until after the final award was entered pursuant to the state procedure and then attempted to invoke the jurisdiction of the federal court by an appeal.

The decision of the lower court merely stated that no such appeal was authorized either by the state code or by Rule 71A. The court did not decide that the petitioner could not initiate its action in the federal court under Rule 71A and did not endeavor to pass upon that question for the reason that it was not before it. 204 F. 2d 116.

The petitioner does not contend that Rule 71A is invalid or that it grants a right of appeal.

It is fundamental, as contended by petitioner, that a state statute cannot invest a federal court with appellate jurisdiction. However, petitioner contends on the one hand that it was bound to follow state procedure initially, and then contends on the other hand that state procedure could not bind it as far as the appeal is concerned. The inconsistency in this argument creates a peculiar paradox, but does not give rise to any substantial question of gravity and importance.

No logical reason is advanced as to why the petitioner should be permitted to follow state procedure, and then if dissatisfied with the award to invoke the jurisdiction of the federal court.

The petitioner had the initial choice of exercising its substantive right to condemn in either the federal or the state forum.

It is admitted by the petitioner that Rule 71A must be followed, but petitioner says t[illegible]fore it can follow the federal procedure it must first follow the state procedure. Such contention is not supported by any citation of authority and no conflict exists. No substantial question of general interest is presented and no special or important reason is advanced as to the necessity of examining the language of Rule 71A which is clear upon its face and which was specifically drafted for the purpose of eliminating conflict or confusion as to the procedure to be followed in federal court in condemnation matters.

IV.

Petitioner is precluded by previous decisions of this court from removing the state court appeal to the federal court.

Following petitioner's attempt to appeal directly from the award of the commissioners to the United States District Court, an appeal from the same award was docketed in the state court by the petitioner who then attempted to remove that action to the United States District Court. It is fundamental that, under the removal statute, 28 U. S. C. A., Sec. 1441 (a), only a defendant is entitled to remove and the only question presented by petitioner is whether or not it was a defendant within the meaning of this statute. No conflict of authority exists on this question and this court has held, without equivocation, that the petitioner is not a defendant.

The Removal Statute is interpreted by the federal courts so as to have a uniform application regardless of local laws or designation of the parties. This principle is amply illustrated in *Shamrock Oil & Gas Corporation v. Sheets*, 313 U. S. 100, 85 L. Ed. 1214, 61 S. Ct. 868, and *Kloeb v. Armour & Company*, 311 U. S. 199, 85 L. Ed. 124, 61 S. Ct. 213. In the *Shamrock* case the plaintiff instituted his action in a state court, the amount involved being insufficient to invoke the jurisdiction of the federal court. Thereafter, the defendant filed a counterclaim, and the sum therein prayed for exceeded the requisite amount necessary to invoke the jurisdiction of the federal court. The plaintiff sought to remove the entire cause to the federal court contending that he became a defendant when the counterclaim was filed. In denying this con-

tention, the court, speaking through Mr. Justice Stone, said, at page 104 of 313 U. S.:

> "Petitioner argues that although nominally a plaintiff in the state court it was in point of substance a defendant to the cause of action asserted in the counterclaim upon which, under Texas procedure, judgment could go against the plaintiff in the full amount demanded. Peck v. McKellar, 33 Tex. 234; Gimble & Son v. Gomprecht & Co., 89 Tex. 497, 35 S. W. 470; Harris v. Schlinke, 95 Tex. 88, 65 S. W. 172. But at the outset it is to be noted that decision turns on the meaning of the removal statute and not upon the characterization of the suit or the parties to it by state statutes or decisions. Mason City & Ft. D. R. Co. v. Boynton, 204 U. S. 570, 51 L. Ed. 629, 27 S. Ct. 321. The removal statute which is nationwide in its operation, was intended to be uniform in its application, unaffected by local law definition or characterization of the subject matter to which it is to be applied. Hence, the Act of Congress must be construed as setting up its own criteria, irrespective of local law, for determining in what instances suits are to be removed from the state to the federal courts. Cf. Burnett v. Harmel, 287 U. S. 103, 110, 77 L. Ed. 199, 204, 53 S. Ct. 74."

In the case of *Mason City & Ft. Dodge Railroad Company v. Boynton*, 1907, 204 U. S. 570, 51 L. Ed. 629, 27 S. Ct. 321, which is cited as controlling authority in the *Shamrock* case, this court determined the status of the parties under Iowa condemnation laws so far as the removal statute is concerned. In that case a condemnation proceeding under the Iowa statutes was involved. There, the landowner appealed from the commissioner's award and then attempted to remove his cause to the federal court. A question was certified to this court as to whether the landowner was a defendant.

The opinion by Mr. Justice Holmes clearly answers this question in the affirmative and it is stated:

"But this court must construe the act of Congress regarding removal. And it is obvious that the word 'defendant' as there used is directed toward more important matters than the burden of proof or the right to open and close. It is quite conceivable that a state enactment might reverse the names which, for the purposes of removal, this court might think the proper ones to be applied. In condemnation proceedings the words 'plaintiff' and 'defendant' can be used only in an uncommon and liberal sense. The plaintiff complains of nothing. The defendant denies no past or threatened wrong. Both parties are actors: one to acquire title, the other to get as large pay as he can. It is not necessary in order to decide that the present removal was right to say that the state decision was wrong. We leave the latter question where we find it. But we are of opinion that the removal in this case was right for reasons which it will not take long to state.

"It is said the proceedings only become a case, within the meaning of the act of Congress, after the preliminary assessment and the appeal, and that then the landowner is in the position of one demanding pay for property which he has lost. If we take a general view of the Iowa statutes, this conclusion is not correct. The railroad might have taken the appeal. If it had, the landowner would have been on the defensive in endeavoring at least to uphold the assessment, but he would have been called the plaintiff none the less. Whichever party appeals, it is not true that the landowner is seeking pay for what he has lost. By § 2011 the railroad is free to decline to take the property if it thinks the price too large. Even if, as in this case, it deposits the amount first assessed with the sheriff, the latter is not to pay it over until the determination of the appeal. § 2010. We see no reason to

suppose that the deposit impairs the railroad's right to withdraw, although the supreme court of Iowa says ubi, supra, that, by payment and entry, the railroad appropriates the land. See § 2013. Probably, too, the position of the parties under the act of Congress should be determined upon general considerations, without regard to what has happened. Looked at as a whole, the Iowa statutes provide a process by which railroads and others may acquire land for their purposes which the owner refuses to sell. The first step is the valuation. Whether it is part of the case or not, it is a necessary condition to the proceedings in court. Against the will of the owner the title to the land is not acquired until the case is decided and the price paid. **The intent of railroad to get the land is the mainspring of the proceedings from beginning to end,** and the persistence of that intent is the condition of their effect. The state is too considerate of the rights of its citizens to take from them their land in exchange for a mere right of action. The land is not lost until the owner is paid. **Therefore, in a broad sense, the railroad is the plaintiff, as the institution and continuance of the proceedings depend upon its will.** Hudson River R. & Terminal Co. v. Day, 54 Fed. 945." (Emphasis ours.)

Here, as in the *Boynton* case, the petitioner has deposited the amount of the award and taken possession of the land. If, as in the *Boynton* case, the landowner is a defendant, for the purpose of removal even when he appeals, it surely cannot be contended that his position becomes that of a plaintiff when the condemnor appeals. This is clearly set forth in the Boynton opinion, wherein it is stated:

"The railroad might have taken the appeal. If it had, the landowner would have been on the defensive in endeavoring at least to uphold the assessment, but he would have been called the plaintiff none

the less. * * * The intent of the railroad to get the land is the mainspring of the proceedings from beginning to end. * * * The land is not lost until the owner is paid. Therefore, in a broad sense, the railroad is the plaintiff, as the institution and continuance of the proceedings depend upon its will."

VII.

The *Boynton* case has been uniformly followed in the federal courts and the lower court found that it was bound to apply the rules laid down by this court in the *Boynton* and *Shamrock* cases and therefore held that the petitioner was not entitled to remove.

No conflict exists on this question between the decision of the lower court and the previous decisions of this court and no special or important reason has been advanced by the petitioner for a redetermination of those decisions.

Petitioner, as a condemnor, had the initial choice of instituting the proceedings in the federal court under Rule 71A (k) or of commencing his proceedings in the state court pursuant to the procedural rules laid down by Chapter 472 of the Code of Iowa, 1950. The fact that the petitioner became dissatisfied with the commissioners' award and then sought federal court jurisdiction is not a substantial, grave or important reason for reversing the *Boynton* and *Shamrock* cases so as to allow the petitioner to remove his action.

CONCLUSION

Therefore, petitioner has not been denied access to the federal courts and the removal question has been pre-

viously determined against petitioner by this court. There is no conflict in the decisions and no valid reason is assigned by the petitioner for the granting of the petition for certiorari.

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IN THE

Supreme Court of the United States

October Term, A. D. 1953

No. 209

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Petitioner*,

vs.

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CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Petitioner*,

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IN THE
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No. 209

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Petitioner*,

vs.

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ARCHIE C. STUDE and WILLIAM LUMPKIN, *Respondents*.

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

These actions arise from the condemnation of a single tract of land by the Chicago, Rock Island & Pacific Railroad Company (hereinafter referred to as Railroad), in which the Railroad attempted two different appeals from the same award made by the State Condemnation Jury. The Railroad first attempted a direct appeal from the award to the United States District Court and then appealed from the same award to the State Court and attempted to remove that proceeding to the

United States District Court. The question presented is whether the Railroad is properly in the Federal Court either by the direct appeal or by the removal from the State Court. Archie C. Stude, owner of the fee in the land, and William Lumpkin, his tenant (hereinafter referred to as Landowners), contend that the proper method of invoking Federal Court jurisdiction would have been to file the action originally in the Federal Court under Rule 71A of the Federal Rules of Civil Procedure.

The substantive right of the Railroad is set forth in Chapter 471 of the Code of Iowa, 1950. This chapter, entitled "EMINENT DOMAIN," relates to condemnations generally. The preliminary procedure for the Railroad in the instant case is set forth in Sections 471.6, 471.9 and 471.10 of the Code of Iowa, 1950, and provides generally that the Railroad shall make application to the Iowa State Commerce Commission for permission to condemn. Section 471.10 concludes "the company shall have power to condemn the lands so certified by the Commission." This procedure was followed in the instant case and the Railroad was authorized by the Iowa Commerce Commission to condemn the lands in question (R. 5).

By an entirely separate chapter the *procedure* for condemnation in Iowa to enforce in the state courts the substantive rights of condemnation granted by Chapter 471 is set out. This is Chapter 472 of the Iowa Code of 1950 entitled, "PROCEDURE UNDER POWER OF EMINENT DOMAIN." This procedural chapter of the Iowa Code is applicable not only to railroads seeking to condemn by state proceedings but also to other condemnors. Thus Code of Iowa 1950, § 472.1, provides:

"The procedure for the condemnation of private property for works of internal improvement, and for other public uses and purposes, unless and except as otherwise provided by law, shall be in accordance with the provisions of this chapter."

The procedure to be followed in a condemnation case in the United States courts is prescribed by the Federal Rules of Civil Procedure, Rule 71A, 28 U. S. C. A., and subdivision (k) of Rule 71A specifically provides that the rule governs in actions involving the exercise of the power of eminent domain under the law of a state and that if the state law provides for trial of any issue by jury or of trial of the issue of compensation by jury or commission, or both, that provision shall be followed.

Alleging that theretofore it had been authorized by the Interstate Commerce Commission and had been granted authority to condemn by the Iowa State Commerce Commission, the Railroad on January 18, 1952, instituted condemnation proceedings before the Sheriff of Pottawattamie County, Iowa, in accordance with the provisions of Chapter 472, Code of Iowa, 1950, and filed a written application for condemnation of the private property of various persons, including land owned by Archie C. Stude and leased by William Lumpkin, respondents herein (R. 5-7). The sheriff appointed six resident freeholders of the county as a commission to assess and appraise damages (R. 7) and a notice of hearing before the commissioners was served on the landowners (R. 7, 9). A hearing was had before the Commissioners and they made their awards, including an award to Archie C. Stude in the amount of Twenty-three Thousand Eight Hundred Eighty-eight and 60/100ths Dollars ($23,888.60) and an

award to William Lumpkin in the amount of One Thousand and no/100ths Dollars ($1,000.00) (R. 7, 8).

The Railroad deposited the awards with the sheriff on February 23, 1952 (R. 18) and took possession of the land condemned under the procedure set forth in Section 472.25 of the Code of Iowa, 1950, which provides:

> "*Right to take possession of lands.* Upon the filing of the commissioners' report with the sheriff, the applicant may deposit with the sheriff the amount assessed in favor of a claimant, and thereupon the applicant shall, except as otherwise provided, have the right to take possession of the land condemned and proceed with the improvement. No appeal from said assessment shall affect such right, except as otherwise provided."

Under Iowa procedure, Chapter 472, Code of Iowa, 1950, the following sections provide that the award is final unless an appeal is taken:

> "Section 472.17. When appraisement final. The appraisement of damages returned by the commissioners shall be final unless appealed from.
>
> "Section 472.18. Appeal. Any party interested may, within thirty days after the assessment is made, appeal therefrom to the district court, by giving the adverse party, his agent or attorney, and the sheriff, written notice that such appeal has been taken."

On March 6, 1952, the Railroad attempted to appeal from the award of the sheriff's commissioners directly to the Federal Court by serving upon Landowners a "Notice of Appeal from Assessment of Damages" in the form prescribed by state procedure as set forth in Section 472.18, Code of Iowa, 1950 (R. 4), and docketing a complaint in the United States District Court (R. 4), and causing an

ordinary summons to be issued and served upon Landowners (R. 9). The notice prescribed by Rule 71A (d), Federal Rules of Civil Procedure, was not served.

Thereafter and on March 11, 1952, the Railroad served a Notice of Appeal to the appropriate State Court from the same award by the sheriff's commissioners (R. 47), and filed a petition of removal to the United States District Court (R. 48).

The United States District Court for the Southern District of Iowa, Western Division, Riley, J., sustained Landowners' motion to dismiss the complaint and overruled Landowners' motion to remand the removal case (R. 37-39; 107 F. Supp. 895).

The United States Court of Appeals for the Eighth Circuit affirmed the dismissal of the attempted direct appeal to the United States District Court and reversed the United States District Court's decision overruling the motion to remand, with directions to grant the motion and remand the cause (R. 87, 88; 204 Fed. 2d 116).

The Court of Appeals held that no right of appeal from the commissioners' award to the United States District Court is provided for in either the State Code or Rule 71A of the Federal Rules of Civil Procedure, and that the right of the Railroad to initiate the proceedings in the United States District Court was not before the court "for the simple reason that it did not do so * * *" (R. 86, 204 Fed. 122). As respects the removal, the Court of Appeals held that the decision of this court in *Mason City and Fort Dodge R. Co. v. Boynton*, 204 U. S. 570, 51 L. Ed. 629, 27 S. Ct. 321, was controlling since that decision involved the right of removal by parties to a

condemnation proceeding commenced under the procedural law of the State of Iowa. The Boynton case, supra, held that in an Iowa condemnation case the landowner is the defendant for purposes of removal. Therefore, the Court of Appeals held that the Motion to Remand should have been sustained.

Thereafter the Railroad filed a petition for rehearing with the Court of Appeals (R. 89-100) which was denied (R. 100-108; 204 F. 2d 954).

In the opinion of the Court of Appeals denying the Petition for rehearing the court emphasizes that the Railroad strictly followed the Iowa procedure for initiating the condemnation suit in the Iowa State courts and that no complaint was filed in the United States District Court until after an appeal was taken from the commissioners' award as required by the Iowa Procedural Statute. The court further held that the Railroad did not attempt to invoke the original jurisdiction of the Federal Court under Rule 71A of the Federal Rules of Civil Procedure (R. 101-107, incl.; 204 F. 2d 954).

SUMMARY OF ARGUMENT

Point I.

A railroad having a right to condemn land pursuant to the substantive law of a state, including Iowa, may proceed initially either in the State Court or in the Federal Court. If it proceeds under the state law, it must follow the state procedure, and if it proceeds in Federal Court, it must follow Rule 71A of the Federal Rules of

Civil Procedure. In this case the Railroad was not denied access to the federal courts. It did not proceed so as to invoke Federal Court jurisdiction.

Franzen v. Chicago, Milwaukee & St. Paul Railway Co., 7 Cir., 278 F. 370.

Mississippi, etc., River Broom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206.

Searl v. School District, 124 U. S. 197, 41 L. Ed. 197, 41 L. Ed. 415, 8 S. Ct. 460.

Madisonville Traction Company v. St. Bernard Mining Company, 196 U. S. 239, 49 L. Ed. 462, 25 S. Ct. 251.

Mason City & Fort Dodge Railway Company v. Boynton, 204 U. S. 570, 51 L. Ed. 629, 27 S. Ct. 321.

Kohl v. United States, 91 U S. 367, 23 L. Ed. 449.

Code, Iowa, 1950, Chapter 471.

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Federal Rules of Civil Procedure, Rule 71A, 28 U. S. C. A.

United States v. 137.82 Acres of Land in Cheshire County, 31 F. Supp. 723

Point II.

There can be no direct appeal to the United States District Court from an award of commissioners appointed by a County Sheriff to appraise damages in a condemnation proceeding instituted under a state condemnation procedural statute and a purported appeal from such an award to the United States District Court is ineffective and confers no jurisdiction in the court.

Franzen v. Chicago, Milwaukee & St. Paul Railway Co., 7 Cir., 278 Fed. 370.

Williams Livestock Company v. Delaware L. & W. R. Co., D. C. Pa., 285 Fed. 795.

California Prune & Apricot Growers Assn. v. Cats American Co., 9 Cir., 60 F. 2d 788.

Burford v. Sun Oil Co., 319 U. S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424

Federal Rules of Civil Procedure, Rule 71A, 28 U. S. C. A.

Notes of Advisory Committee on Rules, 28 U. S. C. A. following Rule 71A.

Point III.

The Railroad failed to follow any of the procedural requirements of Rule 71A; therefore the District Court had no jurisdiction of the person or subject matter herein; and since the State Court first assumed jurisdiction of the res and subject matter herein, said State Court has exclusive jurisdiction.

United States v. Bank of New York & Trust Company, 296 U. S. 463, 56 S. Ct. 343, 80 L. Ed. 331.

Penn General Casualty Company v. Commonwealth, 294 U, S. 189, 558 S. Ct. 386, 79 L. Ed. 850.

Franzen v Chicago, M. & St. P. Ry. Co., 7 Cir., 278 Fed. 370

Havner v Hegnes (C. C. A. 8th, 1920), 269 Fed. 537.

Federal Rules of Civil Procedure, Rule 71A, 28 U. S. C. A.

Cartlidge v. Rainey, 160 F. 2d 841, cer. den. 69 S. Ct. 237, 235 U. S. 885, 93 L. Ed. 424.

Point IV.

A condemnor railroad appealing to a state district court from an award of commissioners, under a state procedural statute is not a "defendant" within the Federal Removal Statute, 28 U. S. C. A., § 1441.

Mason City & Fort Dodge Railroad Company v. Boynton, 1907, 204 U. S. 570, 51 L. Ed. 629, 27 S. Ct. 321.

Shamrock Oil & Gas Corporation v. Sheets, 313 U. S. 100, 85 L. Ed. 1214, 61 S. Ct. 868.

Kloeb v. Armour & Company, 311 U. S. 199, 85 L. Ed. 124, 61 S. Ct. 213.

Code, Iowa, 1950, §§ 472.14, 472.18, 472.20, 472.21.

28 U. S. C. A., §§ 1441(a).

ARGUMENT

Point I.

The Railroad could have exercised its right to condemn by instituting a proceeding in the Federal Court under Rule 71A, Federal Rules of Civil Procedure, but it failed to do so.

The Railroad contends that it has been deprived of its right of access to the federal courts. In examining this contention it is necessary to consider the nature and source of the action. In this connection it is conceded that the question is concerned with exercise of the statutory right or power known to the law of Eminent Domain. The *right* of the Railroad to condemn is governed by Chapter 471, Code of Iowa, 1950, which is entitled "EMINENT DOMAIN." The pertinent sections of this chapter granting to the Railroad the substantive right to condemn (Code of Iowa, 1950, Sections 471.6, 471.9, and 471.10) provide:

"471.6 *Railways.* Any railway, incorporated under the laws of the United States or of any state thereof, may acquire by condemnation or otherwise so much real estate as may be necessary for the location, construction and convenient use of its railway. Such acquisition shall carry the right to use for the construction and repair of said railway and its appurtenances any earth, gravel, stone, timber, or other material, on or from the land so taken."

"471.9. *Additional Purposes.* Any such corporation owning, operating, or constructing a railway may, by condemnation or otherwise, acquire lands for the following additional purposes.

* * * *

"3. For additional or new right of way * * * ."

"471.10. *Finding by commerce commission.* The company, before instituting condemnation proceedings under section 471.9, shall apply in writing to the Iowa State Commerce Commission, for permission to so condemn. Said commission shall give notice to the landowner, and examine into the matter, and report by certificate to the clerk of the district court in the county in which the land is situated, the amount and description of the additional lands necessary for such purposes, present and prospective, of such company; whereupon the company shall have power to condemn the lands so certified by the commission."

Under Section 471.10, Code of Iowa, 1950, the Railroad was granted the power to condemn. This vested the Railroad with a full and complete *substantive right* to acquire the land by condemnation. At that stage of the matter, the Railroad had the choice of electing to initiate its *proceedings* to condemn in the Federal Court under the applicable Federal rules or with the County

Sheriff under the applicable State rules, prescribed by Chapter 472 of the 1950 Code of Iowa.

The distinction between the right to condemn and the remedy for enforcement of the right is clear and fundamental. When the right of condemnation became vested, the railroad could pursue its remedy by whichever method it elected. This distinction is completely overlooked and entirely ignored by the railroad.

Eminent Domain and proceedings instituted for the enforcement of the right to take lands for specified purposes under statutes granting the substantive right to condemn, occupy a unique position in the law. A proceeding in Eminent Domain is "Sui Generis." 29 C. J. S. 1128, Eminent Domain Section 209, In re: South Carolina Public Service Authority, D. C. S. C., 37 F. Supp. 28, 30, Affirmed, C. C. A., Barnes v. South Carolina Public Service Authority, 120 F. 2d 439.

The exercise of the right of eminent domain is in effect a compulsory sale of the owner's interest in the property in which the individual's rights yield to consideration of the common welfare. 29 C. J. S. 777 Eminent Domain Section 2.

Condemnation proceedings are special proceedings adversary in their nature, ordinarily conducted by a temporary tribunal selected for the occasion and subject to judicial review and supervision. Some Courts have regarded the proceedings as proceedings at law, other Courts have regarded them as proceedings in equity. 29 C. J. S. 1128 Eminent Domain Section 209. Yet generally the pro-

ceedings are judicial and involve the exercise of judicial power. 29 C. J. S. 1129 Eminent Domain Section 209.

Since the proceedings are adversary in character no cogent reason exists for denying the jurisdiction of a Federal Court if the other judicial requisites are present. Under Federal Court decisions the Railroad could have and should have instituted its proceedings in the Federal Court at the outset, if it wished to invoke the jurisdiction of that Court.

In *Franzen v. Chicago, Milwaukee & St. Paul Railroad Company*, 7 Cir., 278 Fed. 370, the Court held that a condemnation proceeding authorized by the law of Illinois could be instituted in the federal court, as against the contention that the state court alone was authorized by the Illinois statute to try the issues arising out of the condemnation proceeding considered in that case, and hence the federal court had no jurisdiction of the action. The court considered that the question was settled by the decisions of this court in *Mississippi River Boom Co. v. Patterson*, 98 U. S. 403, 25 L. Ed. 206; *Searl v. School District*, 124 U. S. 197, 41 L. Ed. 415, 8 S. Ct. 460; *Madisonville Traction Co. v. The St. Bernard Mining Co.*, 196 U. S. 239, 49 L. Ed. 462, 25 S. Ct. 251; *Mason City and Ft. Dodge Railroad Co. v. Boynton*, 204 U. S. 570, 51 L. Ed. 629, 27 So. Carolina 321; *Kohl v. U. S.*, 91 U. S. 367, 23 L. Ed. 449. In the opinion the court said, l. c. 278 Fed. 371:

> "But defendants contend that the federal court cannot maintain an action to condemn; the state court alone being authorized by the Illinois statute

to try issues arising out of such proceedings. A very interesting and, we may add, able brief is submitted in support of this contention; but the question is closed by the decisions of the Supreme Court. (Citing cases)

"10 Ruling Case Law, 207, we think, correctly announces the law of these decisions to be:

> "'A judicial proceeding to take land by eminent domain and ascertain compensation therefor is a suit at common law within the meaning of the federal Judiciary Act; and when requisite diversity of citizenship exists such a suit may be brought in or transferred to the federal District Court of the district in which the land lies.'

"See, also, Nichols on Law of Eminent Domain (1917 Ed.), pp. 1040, 1041."

The Supreme Court cases cited in the Franzen case involved the propriety of removing condemnation proceedings from state to federal Court, and it was contended that they were not applicable for the reason that they did not involve the jurisdiction of the court in an initial proceeding. However the Circuit Court of Appeals in the Franzen case said, 278 Fed. 370, at page 372:

> "We fail, however, to appreciate the force of the distinction, for actions are removable only when they could, in the first instance, have been brought in the Federal Court."

In the case of *Kohl et al v. United States*, 91 U. S. 367, 23 L. Ed. 449, Mr. Justice Strong in determining that the exercise of the right of eminent domain constituted a suit at common law or in equity, stated at pages 375, 376 of 91 U. S., page 452 of 23 L. Ed.:

"If, then, a proceeding to take land for public uses by condemnation may be a suit at common law, jurisdiction of it is vested in the Circuit Court. That it is a 'suit' admits of no question." * * *

"When, in the 11th section of the Judiciary Act of 1789, jurisdiction of suits of a civil nature at common law or in equity was given to the Circuit Courts, it was intended to embrace not merely suits which the common law recognized as among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined as distinguished from rights in equity as well as suits in admiralty. The right of eminent domain always was a right at common law. * * * The time of its exercise may have been prescribed by statute but the right itself was superior to any statute. * * * It is difficult, then, to see why a proceeding to take land in virtue of the Government's eminent domain, and determining the compensation to be made for it, is not, within the meaning of the statute, a suit at common law, when initiated in a court. *It is an attempt to enforce a legal right.*" (Emphasis ours.)

To the same effect see *Beatty v. United States*, 4 Cir., 203, F. 620, 623.

Since the power to condemn became fixed and absolute upon authorization by the State Commerce Commission, there remained only the question as to where the proceeding should be initiated for the determination of the damages to be awarded to the landowners.

State Court Procedure

In Iowa, the *procedure* for the enforcement of the substantive right granted by Chapter 471, Code of Iowa, 1950, is delineated in Chapter 472 which is entitled "PROCEDURE UNDER POWER OF EMINENT DOMAIN."

It is there provided that condemnation proceedings shall be instituted by written application filed with the sheriff of the county in which the land sought to be condemned is located, and Section 472.3 prescribes the contents of such an application. Section 472.4 relates to the appointment of a commission by the sheriff of the county in which the land is located, which commission has the duty to assess damages. Sections 472.8 to 472.13, inclusive, relate to the notice of assessment required to be given by the applicant, the form of the notice and service thereof. Section 472.14 provides for the appraisement by the commissioners and the report, and Section 472.17 provides that the *appraisement of damages returned by the commissioners shall be final unless appealed from.* Section 472.18 relates to an appeal from the appraisement and provides as follows:

> "472.18 Appeal. Any party interested may, within thirty days after the assessment is made, appeal therefrom to the district court, by giving the adverse party, his agent or attorney, and the sheriff, written notice that such appeal has been taken."

Subsequent sections in Chapter 472 of the Code of Iowa, 1950 provide for the processing of the appeal and prescribe the rules to be followed in the *state* district court upon the taking of an appeal. It will be noted that the appeal is docketed in the name of the owner of the land as plaintiff and in the name of the applicant for condemnation as defendant (Section 472.21) and that thereafter a petition is filed by the landowner as plaintiff and an answer is filed by the applicant as defendant (Section 472.22). Section 472.25 provides as follows:

"472.25. Right to take possession of lands. Upon the filing of the commissioners' report, with the sheriff, the applicant may deposit with the sheriff the amount assessed in favor of a claimant, and thereupon the applicant shall, except as otherwise provided, have the right to take possession of the land condemned and proceed with the improvement. No appeal from said assessment shall affect such right, except as otherwise provided."

Federal Court Procedure

Due to the unique nature of condemnation proceedings and to the conflict in the procedural statutes of the various states with respect thereto, Rule 71A of the Federal Rules of Civil Procedure was adopted in 1951 to govern *exclusively* the procedure in the federal courts in such proceedings. Federal Rules of Civil Procedure, Rule 71A, 28 U. S. C. A.[1] This rule specifically sets out the procedure to be followed. It provides for the filing of a complaint in which the property to be condemned and at least one of the owners of some part of or interest in the property are named as defendants (Rule 71A (c) (1)). The contents of the complaint are prescribed in Rule 71A (c) (2). This provision of the rule also states that the court may order such distribution of a deposit as the facts warrant. Subsection (c) (3) relates to the filing of the complaint and extra copies thereof.

Subsection (d) of Rule 71A relates to process. It provides that upon the filing of the complaint plaintiff shall forthwith deliver to the clerk joint or several notices directed to the defendants designated in the complaint and that additional notices directed to defendants subsequently

1 Rule 71A is set out in full in Appendix.

added shall be so delivered. The delivery of the notice and its service have the same effect as delivery and service of summons under Rule 4 of the Federal Rules of Civil Procedure. Each notice is required to state the court, the title of the action, the name of the defendants to whom it is directed and that the action is to condemn property, a description of the property sufficient for identification, the interest to be taken, the authority for taking, the uses to which the property is to be put, and that defendant may serve upon the attorney for the plaintiff an answer within 20 days after service of the notice. The notice is required to conclude with the name of the attorney for the plaintiff and an address within the district in which the action is brought where he may be served. Other provisions of subsection (d) of Rule 71A relate to service of the notice and the return.

Subsection (k) of Rule 71A provides as follows:

> "(k) Condemnation under a State's Power of Eminent Domain. The practice as herein prescribed governs in actions involving the exercise of the power of eminent domain under the law of a state, provided that if the state law makes provision for trial of any issue by jury, or for trial of the issue of compensation by jury or commission or both, that provision shall be followed."

It is perfectly clear from the foregoing that the enforcement of the right granted by Chapter 471, Code of Iowa, 1950, is governed by Chapter 472, Code of Iowa, 1950, when the action to condemn is initiated by filing a written application with the sheriff of the county in which the land to be condemned is situated. It is also perfectly clear that the enforcement of such right is governed by Rule 71A of the Federal Rules of Civil Procedure when the action to condemn is initiated in the federal court.

The adoption of Rule 71A did not affect the jurisdiction of United States District Courts with regard to condemnation actions. The rule merely provides a uniform method of condemnation procedure in federal courts. The Railroad seeking to condemn Iowa land for railroad purposes, had the same rights, the same choice of forum, before the effective date of Rule 71A as it had thereafter. The fact that under state practice a matter is first decided in an administrative proceeding does not mean that the enforcement of the same substantive right cannot be determined in the federal court by filing a civil action therein.

As heretofore pointed out in the *Kohl* and *Franzen* cases, supra, the enforcement of the right of eminent domain is a suit cognizable by the federal courts.

In the case of *United States v. 137.82 Acres of Land in Cheshire County,* D. C. N. H., 31 F. Supp. 723, the government filed a petition in federal court to condemn certain lands in New Hampshire for flood control purposes. The defendant landowners filed a motion to dismiss alleging lack of jurisdiction in the court for the reason that the procedure did not conform to that prescribed by the statutes of New Hampshire which provided for a petition to the selectmen of the town for an assessment of damages with a right of appeal from the award to the superior court of the county. The question presented was whether the method of procedure prescribed by the New Hampshire statutes was exclusive and such as to deprive the federal court of its jurisdiction in proceedings for the condemnation of New Hampshire land.

In upholding its jurisdiction, the court referred to old title 28 U. S. C. A., Section 41 (1), which now appears as 28 U. S. C. A. 1331, relating to the jurisdiction of the district court over all suits of a civil nature brought by the United States, and stated at page 726 of 31 F. Supp.:

> "Condemnation of land is not a criminal proceeding or a suit in admiralty. It is an action of a civil nature and the act above cited vests jurisdiction in the District Courts."

The Iowa procedural statute does not and cannot in any way limit or restrict the jurisdiction of the federal court. In the case of *Mexican Central Railway Co. v. Pinkney*, 149 U. S. 194, 13 Sup. Ct. 859, 37 L. Ed. 699, Mr. Justice Jackson, speaking for the court, stated:

> "The jurisdiction of the circuit courts of the United States has been defined and limited by Congress and can be neither restricted nor enlarged by statutes of the state."

Under Rule 71A a uniform method of procedure in condemnation proceedings in federal court has been prescribed and must be followed. Subsection (k) of Rule 71A specifically embraces this proceeding.

The Railroad had the right to condemn and the remedy was not and could not be limited to the filing of application with the sheriff. The Railroad had a choice of forum—state or federal. That it chose state procedure to enforce its substantive right of condemnation was not the fault of the Landowners.

It is stated by the Railroad that the Court of Appeals for the Eighth Circuit held that the Railroad was

precluded from invoking the jurisdiction of the United States District Court. This, we respectfully submit, was not the holding of the Court of Appeals. In its opinion, 204 Fed. 2d 116, at page 122 the court states:

> "The question of whether the Rock Island could have initiated the proceedings in the United States District Court is not before us for the simple reason that it did not do so and hence the propriety of such action is not presented. We express no opinion on that subject."

It is apparent, from the argument set forth in Divisions I and II, pages 15 through 26 of the Railroad's brief, that the Railroad has confused the question of a right which will give rise to a cause of action in the Federal Courts, and the designation of a particular state procedural remedy as a civil action.

All of the cases cited by the Railroad in this connection involve removal proceedings and deal with the question of whether an action instituted under a state procedural statute has reached a stage where it can be regarded as a "civil action" for the purpose of removing the case to the Federal Courts. None of these cases state or constitute authority for the proposition that a cause of action resulting from the vesting of the right of Eminent Domain could not be instituted in the Federal Court as an original proceeding. The cases merely hold that if the procedure prescribed by the state statute for the enforcement of the right, provides a preliminary inquest in the nature of an administrative inquiry, and, if the condemnor initiates that inquiry before a state officer or officers, the proceedings conducted before such officers or board are not in the nature of a "civil action,"

but that when an appeal from such proceedings is lodged in a state court the proceedings become, for the first time, a civil action within the meaning of the removal statute.

The Railroad concedes that the state cannot circumscribe, limit or enlarge the jurisdiction of the Federal Court and on page 22 of its brief, it quotes from the opinion of this Court in *Searl v. School District*, 124 U. S. 197, 31 L. Ed. 415:

> "* * * The appointment of commissioners to ascertain the compensation is only one of the modes by which it's to be determined. The proceeding is therefore, a suit at law from the time of the filing of the petition and the service of process upon the defendant."

United States v. 157.82 Acres of Land in Cheshire County, D. C. N. H., 31 F. Supp. 723, previously discussed on page 18 of this brief, adequately answers the Railroad's contention in this regard. In that case it was held that condemnation of land is an action of a civil nature and that state method of procedure was not exclusive. It was further held that the Federal Court would follow as near as possible the state procedure in the Federal Court as required by the conformity laws. See also, *Kohl v. United States*, 91 U. S. 367, 28 L. Ed. 449.

As we have pointed out, the right of eminent domain, as distinguished from the procedural remedy, is clear and distinct. When the Railroad became vested with the right to condemn under Chap. 471 of the Code of Iowa, 1950, it could have instituted its proceeding to condemn by filing a petition in the United States District Court. The state could not limit and did not attempt to limit the jurisdiction of the Federal Courts in

this respect. Under Rule 71A, Federal Rules of Civil Procedure, the United States District Court would have been obligated to appoint or to have appointed commissioners for the purpose of making a preliminary determination of the damages as was done in the Searl case, supra, after the action had been removed. It is clear that the court has such a right and duty. It is also clear that the conduct of such proceedings in the Federal Court in no way affects the jurisdiction of that court. The Railroad's contention that such a preliminary determination is a condition precedent to the jurisdiction of the Federal Court is clearly without merit and is contrary to the established legal precepts as set forth in the decisions heretofore referred to.

In *Myers v. C. & N. W. R. R. Co.*, 118 Ia. 312, 91 N. W. 1076, the Supreme Court of Iowa at page 1079 of 91 N. W. states:

> "The mode adopted in instituting a suit cannot be regarded of controlling importance. The uniform holding has been that procedure prescribed by the state for its own courts cannot deprive the federal courts of their original jurisdiction."

And again at page 1080 of 91 N. W.:

> "The jurisdiction of the federal courts cannot be made to depend upon formal or modal matters; otherwise it would be in the power of the states to defeat that jurisdiction entirely by hostile legislation hedging about the commencement of suits by a statutory procedure, which could not be employed in the federal courts." (Citing cases.)

The Railroad commenced the enforcement of its right by filing an application with the sheriff. That it was dis-

satisfied with the award made by the sheriff's commissioners and wished then to invoke the jurisdiction of the United States District Court, is no justification for transfer of the case to federal court, nor does it give force to the Railroad's assertion that it has been deprived of its right to initiate its proceeding in the federal court.

Point II.

The Federal Court has no jurisdiction of the Railroad's appeal from the commissioners' awards.

In determining whether the district court has jurisdiction of the Railroad's appeal from the awards of the sheriff's commissioners, it is the well-settled rule that the presumption, on direct attack, is again the jurisdiction of a federal court in a particular case, until the contrary affirmatively appears. *Norton v. Larney,* 266 U. S. 511, 69 L. Ed. 413, 45 S. Ct. 145; *McNutt v. General Motors Acceptance Corp.*, 298 U. S. 178, 80 L. Ed. 1135, 56 S. Ct. 780.

The Railroad cites no authority in support of the jurisdiction of the United States District Court to entertain appeals from state proceedings of this nature.

The Railroad in the present instance, after becoming vested with the substantive right to condemn, elected to follow state procedure in the enforcement of the right to the point where an award was made, and, then, appealed to the Federal Court. At the time of the purported appeal the Railroad had paid into the sheriff's office the amount of the awards and had taken possession of the lands and proceeded with the new construction.

We find authority neither in statute nor in precedent for the attempted appeal from the award of the sheriff's commissioners to the United States Court. The Iowa statutes clearly contemplate only an appeal to the District Court of the State of Iowa and in any event the state statutes could not govern federal proceedings. See *Franzen v. Chicago, Milwaukee & St. Paul Ry. Co.*, 278 Fed. 370. Likewise, the applicable Federal Rules make no provisions for any appeal to the Federal District Court from an award made in state proceedings. The Federal Rules *clearly contemplate that if a condemnation case is to be maintained in the federal court it must be instituted in that court or be properly removed there.* If cannot be started as a state proceeding and appealed to the federal court.

The provision of subsection (k) of Rule 71A that "if the state law makes provision for trial of any issue by jury, or the trial of the issue of compensation by jury, or commission or both, that provision shall be followed," contemplates, we respectfully submit, only that if a trial by commission and jury is prescribed by the state law then the litigant in a federal court proceeding is likewise entitled to trial by commission and jury. It does not contemplate use of state procedure and state process to the point of giving notice of appeal; it does not authorize an appeal to the federal court from the award of the sheriff's commissioners.

The procedure to be followed in a federal court condemnation proceedings is set out in Rule 71A, Federal Rules of Civil Procedure, 28 U. S. C. A. The rule specifies that a complaint shall be filed and designates the contents thereof. Rule 71A (c) (2). It further prescribes

the notice to be given and the manner and effect of the service thereof.

The Railroad did not follow the procedure set forth in Rule 71A, and we respectfully sumbit that the obvious and only method of invoking federal court jurisdiction of condemnation proceedings is to commence the action in the federal court as provided in Rule 71A. Subdivision (k) of Rule 71A specifically relates to condemnation under state substantive law, as follows:

> *(k) Condemnation under a State's Power of Eminent Domain.* The practice as herein prescribed governs in actions involving the exercise of the power of eminent domain under the law of a state, provided that if the state law makes provisions for trial of any issue by jury, or for trial of the issue of compensation by jury or commission or both, that provision shall be followed."

Prior to the promulgation of Rule 71A, and under the older conformity statutes, the federal courts in condemnation proceedings followed the state practice insofar as possible. This resulted in great confusion, especially so since a particular state often had several statutes involving condemnation and it was difficult to determine which statute of a particular state should be followed in substance in a particular federal proceeding. That was the primary reason for the promulgation of Rule 71A. *But even under the old conformity procedure the federal courts did not go so far as to sanction a proceeding part state and part federal in nature.*

It is manifest from an examination of the notes of the Advisory Committee on Rules found in the United States Code Annotated following Rule 71A, that the rule

was designed to effectuate a uniform method of procedure in condemnation proceedings initiated in federal court, whether the substantive right being enforced arises from federal or state law. The Committee described the previous practice under the conformity system as "atrocious," and their report discloses conclusively that an applicant for condemnation who proceeds in the federal court under authority of a state statute must follow the procedure prescribed by Rule 71A with the condition only that if state law prescribes trial by jury or by commission or by both, then the litigants in the federal court are entitled to the same method of trial. The following excerpts from the report indicate the purpose and scope of the rule:

> "The Advisory Committee have given more time to this rule, including time required for conferences with the Department of Justice to hear statements of its representatives, than has been required by any other rule. The rule may not be perfect but if faults develop in practice they may be promptly cured. Certainly the present conformity system is 'atrocious.' 28 U. S. C. A. following Rule 71 A, pocket part, page 98.
>
> "Rule 71 A affords a uniform procedure for all cases of condemnation invoking the national power of eminent domain, and, to the extent stated in subdivision (k), for cases invoking a state's power of eminent domain; and supplants all statutes prescribing a different procedure." 28 U. S. C. A. following Rule 71 A, pocket part, pages 102, 103.
>
> "*Note to Subdivision (h).* This subdivision prescribes the method of determining the issue of just compensation in cases involving the federal power of eminent domain. The method of jury trial provided by subdivision (h) will normally apply in cases in-

volving the state power by virtue of subdivision (k)." 28 U. S. C. A. following Rule 71 A, pocket part, page 104.

"*Note to Subdivision (k).* While the overwhelming number of cases that will be brought in the federal courts under this rule will be actions involving the federal power of eminent domain, a small percentage of cases may be instituted in the federal court or removed thereto on the basis of diversity or alienage which will involve the power of eminent domain under the law of a state. See Boom Co. v. Patterson, 1878, 98 U. S. 403, 25 L. Ed. 206; Searl v. School District No. 2, 1888, 8 S. Ct. 460, 124 U. S. 197, 31 L. Ed. 415; Madisonville Traction Co. v. Saint Bernard Mining Co., 1905, 25 S. Ct. 251, 196 U. S. 239, 49 L. Ed. 462. In the Madisonville case, and in cases cited therein, it has been held that condemnation actions brought by state corporations in the exercise of a power delegated by the state might be governed by procedure prescribed by the laws of the United States, whether the cases were begun in or removed to the federal court. See, also, Franzen v. Chicago, M. & St. P. Ry. Co., C. C. A. 7th, 1921, 278 F. 370, 372.

"Any condition affecting the substantial right of a litigant attached by state law is to be observed and enforced, such as making a deposit in court where the power of eminent domain is conditioned upon so doing. (See also subdivision (j).) Subject to this qualification, subdivision (k) provides that in cases involving the state power of eminent domain, the practice prescribed by other subdivisions of Rule 71 A shall govern." 28 U. S. C. A. following Rule 71 A, pocket part, page 105.

There is nothing in the rule to justify an assumption that the present proceeding is excepted from its scope and application, and to permit an exception in this instance would be contrary to the very purpose for which

it was promulgated. If each litigant desiring to condemn is entitled to place his own interpretation on the rule depending upon the circumstances in which he finds himself, then the rule is a mere shadow of form, without substance. The uniformity which it was designed to achieve would be lost and a system more atrocious than the rule of conformity would develop.

Rule 71A does not grant, nor does it purport to grant, any remedy which did not exist for the enforcement of the right of condemnation before its enactment. No right of appeal from a state proceeding to the federal court existed before its enactment and none exists as a result of its enactment.

The proper procedure for the Railroad to have followed in the instant case, if the Railroad was desirous of maintaining it in the Federal Court, is disclosed by an examination of prior federal decisions. In *Franzen v. Chicago, Milwaukee & St. Paul Ry. Co.*, 7 Cir., 278 Fed. 370, the Circuit Court of Appeals for the Seventh Circuit held that the Illinois condemnation statute, requiring the jurors to be selected from the freeholders of the county and regulating the number of challenges, did not govern a condemnation action in the federal courts, as the state legislature was not authorized and did not intend to prescribe for federal courts a practice in conflict with the Judicial Code, Section 287 and other Federal Statutes. In the instant case, the Iowa Code, Chapter 471, gives a substantive right to condemn and the railroad might proceed to condemn either in the state court of Iowa or the federal court, *but if the condemnation is in the state court the railroad must follow the proceedings outlined by the Iowa*

statutes and if the condemnation is in the federal court the provisions of Rule 71 A of the Federal Rules of Civil Procedure govern and must be followed. The United States District Court has no jurisdiction to entertain a so-called appeal from the decision of commissioners who are appointed pursuant to and under state law.

The Railroad in the present instance seeks to invoke the jurisdiction of the United States District Court through a procedural remedy of appeal provided by Chapter 472, Code of Iowa, 1950, which provides (Section 472.1):

> "Procedure provided. The procedure for the condemnation of private property for works of internal improvement, and for other public uses and purposes, unless and except as otherwise provided by law, shall be in accordance with the provisions of this chapter."

That the statute of Iowa above cited is procedural is beyond question. The only court having jurisdiction over such an appeal in the first instance is the state court. No jurisdiction could be vested in the federal court by the state procedural statute. The United States District Court has no appellate jurisdiction in this instance. The state cannot invest such jurisdiction and Congress has not done so.

There are many cases involving the exercise of the power of eminent domain by the United States in the various states where the courts under the conformity acts followed state practice as far as possible. If a right to trial by jury or jury and commissions was provided under the state procedure, the federal court permitted trial by similar tribunals but in no instance did the court follow the state practice to the point of having the appraisers appointed by the same officer who would ap-

point them under state court practice. The federal court in these cases appointed the commissioners itself, or ordered the United States marshal to do so. See *Central Neb. Public Power & Irr. District v. Harrison*, 8 Cir., 127 Fed, 588; *United States v. Dillman*, 5 Cir., 146 F. 2d 572; *United States v. 40,558 acres of land in Newcastle County, Delaware*, 62 Fed. Supp. 98; *United States v. 16,572 acres of land*, D. C. S. D. Texas, 49 Fed. Supp. 555; *United States v. 18,236 acres of land in Franklin, Pennsylvania*, 63 Fed. Supp. 665; *United States v. 1010.8 acres of land in Sussex County, Delaware*, 77 Fed. Sup. 529; *United States v. 17,280 acres of land more or less, situated in Saunders County, Nebraska*, 47 Fed. Supp. 267; *United States v. 250 acres of land in Nueces County, Texas*, 43 Fed. Supp. 937; *United States v. 266.25 acres of land in Charleston County, South Carolina*, 43 Fed. Supp. 633; *United States v. Federal Land Bank of St. Paul*, 8th Cir., 127 F. 2d 505.

Williams Livestock Company v. Delaware, L. & W. R. Co., D. C. Pa., 285 Fed. 795, illustrates the point we make. Under the Pennsylvania statute there involved, the right to condemn arose after posting bond (in this case the right arose upon securing permission of the Iowa State Commerce Commission under Section 471.10, Code of Iowa, 1950). In the Pennsylvania case the first step in condemnation was appointment of viewers (here it is appointment of commissioners). In that case it was held by the Federal Court that the provisions of the statute requiring the viewers appointed to assess damages for land condemned, on a petition filed in a court "of this Commonwealth" to be chosen from a board selected by the Court of Common Pleas of the county, and

that they shall meet at the place designated by such Court, be governed by its rules and orders and report to it, *were not applicable when the petition was filed in the federal court* which was required to conform to the state court practice as near as might be. The court held that the viewers would be appointed by the court and that the court would not make its selection of viewers from the county board appointed by the judge of the Court of Common Pleas of the county. The court said that the state statute did not attempt to limit the action of the federal court and that if it did so, the selection and appointment of the viewers would be that of the state and not of the federal court.

That the federal court has no jurisdiction to enforce a remedy provided for by state statute is well established. In *California Prune & Apricot Growers Association v. Cats American Company*, 9 Cir., 1932, 60 F. 2d 788, 790, which involved a special arbitration procedure provided by state statute, wherein a dispute as to certain contractual rights and obligations was involved, the court said:

> "It is undoubtedly true that a federal court in proper cases may enforce state laws; but this principle is applicable only when the state legislation invoked, creates or establishes a substantive or general right."
>
> * * * * *
>
> "The law that controls in the matter of the remedy is the law of the forum and no other. The federal courts are without jurisdiction or power to enforce a purely remedial or procedural state law."

And, quoting from *Chelentis v. Luckenbach Steamship Company, Inc.*, 247 U. S. 372, 379, 384, 38 S. Ct. 501, 504, 62 L. Ed. 1171, the court said:

> "* * * 'the only difference between a proceeding in one court or the other would be that the remedy would be regulated by the lex fori' * * * 'The distinction between rights and remedies is fundamental. A right is a well founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury. Bouviers Law Dictionary.'"

We respectfully submit that the only procedure to follow in order to invoke the jurisdiction of the federal court in condemnation is that outlined in Rule 71A of the Federal Rules of Civil Procedure. The rule is couched in mandatory terms. It provides what an applicant "shall" do to invoke jurisdiction. Rule 71A, having been promulgated by this court, having been transmitted to Congress by the Chief Justice of the United States, and Congress having taken no action thereon within the prescribed time, became effective on August 1, 1951, as provided in the order of this court, 28 U. S. C. A. Section 2072. Rule 71A has the force and effect of law and its "regulation must be regarded as complete and exclusive, inhibiting what it does not allow, as well as governing what is fixed by positive appointment." *The Sloop Merchant*, D. C. New York, Abb. Adm. 1, 17 Fed. Cas. No. 9, 434. See also: *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23; *Sibbach v. Wilson & Co.*, 312 U. S. 1, 85 L. Ed. 479, 61 S. Ct. 422; *Kellman v Stoltz*, D. C. Ia., 1 F. R. D. 726; *Austin v. Riley*, 55 Fed. 833.

As Rule 71A is exclusive and as it does not provide for an appeal from state condemnation proceedings to

the federal court, but does provide a method of procedure directly in the federal court with guarantee of trial by commission and jury if that is permitted in the state court, the purported appeal to the United States District Court was without effect. The Railroad did not elect to institute federal court condemnation proceedings. It could not invoke the jurisdiction of the federal court by the procedure it attempted to follow in these proceedings.

The Court of Appeals in its decision below (204 F. 2d 120, 122) clearly inveighs against any such appellate jurisdiction when it says:

> "The short and simple answer to the Rock Island's contention that it had the right of direct appeal from the commissioners' award to the federal court is that there was no right of appeal from the commissioners' award to the federal court provided for in the state Code and Rule 71 A confers none. No such right exists."

The Railroad recognized the questionable nature of its appeal to federal court; hence it also appealed to the state district court and then attempted to remove that proceeding to the federal court. That its efforts in both instances were contrary to the law is no excuse for a claim that it has been deprived of access to the federal courts. The decision as to forum was the Railroad's, but it was a decision to be made initially. It could not later be changed to meet what the Railroad might deem the exigencies of its case.

It is evident from the assertions made by the Railroad in the last four divisions of its brief that it fails to recognize the fundamental difference between a right and a remedy. As heretofore pointed out, the Rail-

road concedes that the state would have no right to limit the jurisdiction of the federal court. Yet no Railroad, in its argument, takes the position in the first instance that the state, by prescribing a procedural remedy by commissioners for the enforcement of a vested right, has precluded the federal court from taking initial cognizance of the enforcement of that right. Then the Railroad takes the paradoxical position that the same state procedural statute, by providing for an appeal to the state district court, cannot deprive the federal court of its jurisdiction of that appeal.

In attempting to rationalize this inconsistency the Railroad states that the notice of appeal to the United States District Court was not really a notice of appeal at all but merely the fulfillment of a condition imposed by the state procedural statute as a condition prerequisite to invoking the jurisdiction of the federal court. It is manifest that if there was a civil action created for the first time when the commissioners made their award, then no condition could be imposed by the state statute as a condition to bringing that action into federal court. On the other hand, if no civil action was created when the commissioners made their award then no civil action could be created by an appeal to the federal court because no appellate jurisdiction exists in the federal court whether from an administrative award or otherwise.

In support of its contention the Railroad relies on several workmen's compensation cases. We respectfully submit that these compensation cases cited by the Railroad afford no authority for its contention that it may

appeal from the commissioners' award to the federal court. The compensation cases are readily distinguished.

In a few states there is no appeal from the board or commission in a workmen's compensation case. But the parties have a substantive right to file an *independent action* to set aside the award of the board, and that right, it is held, may be exercised in either the state or the federal court, whichever first obtains jurisdiction. Of course there is no cause of action to set aside an award of an induistrial accident board or commission until the award is made. It is then that the *substantive right* sought to be enforced arises.

In the instant case we respectfully submit, the substantive right exists by virtue of the Iowa Code, Chapter 471. All the prerequisites of the cause of action sought to be enforced by the Railroad existed before the Railroad filed the application in the sheriff's office. That application was merely the first step in the enforcement of the cause of action by state proceedings. Condemnation proceedings before the sheriff with appeal to the state district court are procedural steps prescribed by Chapter 472 of the Iowa Code. They pertain to state proceedings; they have nothing to do with federal procedure.

In states where administrative proceedings are set up to administer rights provided by the compensation law and an appeal to the state court from an award of the commission is provided, a compensation case cannot, after the administrative determination, be filed in or removed to federal court. This is discussed in *Flowers v. Aetna Casualty & Surety Co.*, 163 F. 2d 411, cited by the Railroad.

No logical reason is advanced as to why the Railroad should be permitted to follow state procedure, and then if dissatisfied with the award to invoke the jurisdiction of the federal court. The Railroad had the initial choice of exercising its substantive right to condemn in either the federal or the state forum.

It is admitted by the Railroad that Rule 71A must be followed, but the Railroad says that before it can follow the federal procedure it must first follow the state procedure. Such contention is not supported by citation of authority and none exists. Rule 71A is clear upon its face and was specifically drafted for the purpose of eliminating conflict or confusion as to the procedure to be followed in federal court in condemnation matters.

The case of *Burford v. Sun Oil Co., et al*, 319 U. S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424, relied on by Railroad, involved entirely different principles which are not applicable here. In that case an action was commenced in equity in the federal court to set aside an order of a Texas commission granting a permit to drill oil wells. A comparable situation in this case would have been presented if an equitable action had been commenced to set aside the order of the Iowa State Commerce Commission authorizing petitioner to condemn the lands here involved. The case involved herein is an appeal from an award and does not attempt to set aside the award. This distinction is set forth in the Burford case as follows:

> "There is some argument that the action is an 'appeal' from the State Commission to the federal court since an appeal to a State Court can be taken under relevant Texas statutes; but of course the Texas legislature may not make a federal district

court, a court of original jurisdiction, into an appellate tribunal or otherwise expand its jurisdiction, and the Circuit Court of Appeals in its decision correctly viewed this as a simple proceeding in equity to enjoin the enforcement of the Commission's order." (63 S. Ct. at page 1099.)

Thus in the *Burford* case, supra, the action was commenced in equity to set aside an order of the State Commission on the ground that the order was a denial of due process of law. The instant case involves merely a review of the amount of the award by the sheriff's commission and is in no sense a separate cause of action to set aside an order.

Point III.

The District Court was without jurisdiction as to the person and subject matter.

Even if the Railroad were otherwise properly before the federal court under the complaint, the courts below properly dismissed the complaint for the further reasons that the notices required by Rule 71A were not served and the State district court first obtained jurisdiction of the res or subject matter and therefore has exclusive jurisdiction.

As previously noted, Rule 71A of the Federal Rules of Civil Procedure, which became effective on August 1, 1951, sets forth the procedure for condemnation actions brought in the United States district courts. Subdivision (d) thereof provides for a Notice to be served upon Landowners, and sets out the contents of the Notice and the manner of the service thereof. Subdivisions (1) and (2) of said Subdivision (d) of Rule 71A provide as follows:

"(1) Notice: Delivery. Upon the filing of the complaint the plaintiff shall forthwith deliver to the clerk joint or several notices directed to the defendants named or designated in the complaint. Additional notices directed to defendant subsequently added shall be so delivered. The delivery of the notice and its service have the same effect as the delivery and service of the summons under Rule 4.

"(2) Same: Form. Each notice shall state the court, the title of the action; the name of the defendant to whom it is directed, that the action is to condemn property, a description of his property sufficient for its identification, the interest to be taken, the authority for the taking, the uses for which the property is to be taken, that the defendant may serve upon the plaintiff's attorney an answer within 20 days after service of the notice, and that the failure so to serve an answer constitutes a consent to the taking and to the authority of the court to proceed to hear the action and to fix the compensation. The notice shall conclude with the name of the plaintiff's attorney and an address within the district in which action is brought where he may be served. The notice need contain a description of no other property than that to be taken from the defendants to whom it is directed."

The Railroad did not follow the procedure above set forth. It followed the state court procedure and served a "Notice of Appeal from Assessment of Damages" as provided by Section 472.18, Code of Iowa, 1950, and, after the compalint was filed, caused a copy of the complaint together with an ordinary summons to be served upon the Landowner. The notice prescribed by Rule 71A (d) which should have been served does not require the defendants to appear, whereas the summons served by the Railroad purported to require the defendants to appear.

It is fundamental that questions of procedure in the federal courts are governed by the Federal Rules of Civil Procedure, and Rule 71A (a) specifically provides that the Rules of Civil Procedure before the United States District Court govern the procedure for the condemnation of real property under the power of eminent domain, except as otherwise provided in the Rule.

The Landowners respectfully submit that there has been absolutely no compliance with subsection (d) of Rule 71A, and the "Brief of Petitioner" does not contend that the Railroad complied with the express requirements of Rule 71A. As the Railroad has failed to show any reason for not complying with Rule 71A and as there has been no compliance with said Rule, and particularly with reference to the process required by the Rule, Landowners submit that the United States District Court is without jurisdiction of the person of the Landowners.

Furthermore, the United States District Court acquired no jurisdiction of the res or subject matter of the proceedings. The State District Court first acquired jurisdiction of the subject matter and that jurisdiction is exclusive.

After the appraisement of damages by the Pottawattamie County Sheriff's Commissioners, and before any attempted appeal was taken, the Railroad deposited the amount of the award with the sheriff. The state statutes do not require the making of the deposit as a prerequisite to the appeal. The state statutes provide under Section 472.25 of the Code of Iowa, 1950, that if the applicant for condemnation deposits the amount assessed in favor of a claimant, the applicant shall have the right

to take possession of the land condemned and proceed with the improvements. Section 472.28 of the Code of Iowa, 1950 provides that the sheriff shall hold the deposit until the appeal is finally determined. In other words, the Railroad followed the state procedure set forth in Chapter 472 of the Code of Iowa in depositing the money with the sheriff. Said deposit is by state statute specifically made subject to an appeal to the state district court.

Chapter 472 of the Code of Iowa further provides that the assessment as determined on appeal shall be certified to by the clerk of the District Court and upon being furnished with a copy the Sheriff may remove the condemnor unless the amount of the assessment is paid. Chapter 472 further provides that the clerk of the district court shall file certain records pertaining to the appeal and the payments received and paid out in the condemnation suit. Therefore it is clear that the appeal to the state district court related to the deposit made with the sheriff and the state district court obtained jurisdiction over the res or subject matter in that the state district court assumed control over the deposit made and the possession which was thereby granted to the Railroad under state law.

If the Railroad had properly commenced the action in the federal court in the first instance the land would have been required to be made the defendant under Rule 71A (c) (1), and thereby the federal court would have obtained jurisdiction of the subject matter. Furthermore, subdivision (j) of Rule 71A provides for a deposit in the federal court and the notes of the advisory committee

to subdivision (j) indicate that this subdivision shall apply where substantive state law permits the making of a deposit in order to obtain possession. Therefore, if the action had properly been commenced in the federal court in the first instance the land would have been named defendant and the deposit would have been made in the federal court.

Obviously, both the state court and the federal court cannot have jurisdiction over the same res or subject matter involved herein. The Railroad proceeded under state procedure before the sheriff's commissioners and made the deposit under state procedure with the state sheriff. The Iowa statute specifically provides that such a deposit shall be held pending an appeal to the state district court.

It must also be noted that the state sheriff who holds the deposit was neither named nor served with process as a party to the appeal sought to be lodged in the federal court. He is not an officer of the federal court and has no statutory authority for holding the deposit subject to an attempted appeal to the federal court. The state law provides in the procedural chapter, Chapter 472, that the sheriff, after the appeal is finally determined, shall pay the amount of the award to the clerk of the state district court and the clerk shall then compute the costs, including the costs of the condemnation jury (Section 472.33) and file a written record in the office of the County Recorder (Section 472.36). The sheriff would have no authority in the instant case for delivering the money to the Clerk of the United States District Court since by Statute the Sheriff is holding the deposit pending the appeal to the State district court.

In *Cartlidge vs. Rainey*, 5 Cir., 1948, 160 F. 2d 841, cer. den. 69 S. Ct. 237, 235 U. S. 885, 93 L. Ed. 424, a Texas sheriff seized certain whiskey under the Texas Liquor Control Act. A suit was first instituted in the federal court seeking to enjoin the forfeiture by the State and thereafter a suit was instituted in the Texas state court seeking the forfeiture of the materials seized. The Court of Appeals held that even though the State suit was filed after the federal suit, the jurisdiction of the state court related to the time of the seizure which was prior to the filing of the action in the federal court and that therefore the state court had jurisdiction in rem of the very property that was sought to be recovered in the suit in the federal court.

In *United States vs. Bank of New York & Trust Company*, 296 U. S. 463, 80 L. Ed. 331, 56 S. Ct. 343, the New York Superintendent of Insurance held funds belonging to Russian insurance companies under an order of the New York state court, and it was held that since the New York state courts first assumed jurisdiction of the res, the Federal District Court was without jurisdiction in a suit by the United States for an accounting and delivery of funds. In the course of the opinion the Court states at page 447 of 296 U. S.:

> "The principle, applicable to both federal and state courts, that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, is not restricted to cases where property has been actually seized under judicial process before a second suit is instituted. It applies as well where suits are brought to marshal assets, administer trusts, or liquidate estates, and in suits of a similar nature, where, to give effect

to its jurisdiction, the court must control the property. Farmers' Loan & Trust Co. v. Lake Street Elevated R. Co., 177 U.S. 51, 61, 20 S. Ct. 564, 44 L. Ed. 667. If the two suits are in rem or quasi rem, so that the court must have possession or control of the res in order to proceed with the cause and to grant the relief sought, the jurisdiction of one court must of necessity yield to that of the other. Penn General Casualty Company v. Pennsylvania, 294 U.S. 189, 195, 55 S. Ct. 386, 79 L. Ed. 850."

Also in *Penn General Casualty Company vs. Commonwealth*, 294 U.S. 189, 79 L. Ed. 850, 55 S. Ct. 386, where a receivership action was first commenced in the Federal Court, it was held that the State could not thereafter obtain jurisdiction over the property, since the Federal Court had first assumed jurisdiction over the res.

The proposition is also discussed in *Franzen vs. Chicago, M. & St. P. Ry. Co.*, 7 Cir., 278 Fed. 370, where a plea of abatement was entered in the Federal Court. The Court states that the fact that a proceeding was also pending in the State Court would not bar the action. However, the Court adds, pages 372 of 278 F.:

"A different situation would have existed had a state court, in first taking jurisdiction of the cause of action, also taken possession of the res."

In a later case, *Havner v. Hegnes* (8 Cir., 1920), 269 Fed. 537, the Court of Appeals held that where a suit was commenced in the Federal Court for receivership, that court acquired constructive possession of the property to the exclusion of a subsequent action commenced in the Iowa State Court.

The Railroad contends that the cause of action alleged in its complaint is an original action within the

original jurisdiction of the district court. The Railroad cannot with consistency contend that the federal court has jurisdiction or control over the deposit made with the sheriff since by state statute the deposit is to be held pending an *appeal*. It follows that the state courts obtained jurisdiction over the deposit by reason of the appeal to the state district court.

Point IV.

The Railroad was not the "Defendant" within the federal removal statute, in taking an appeal from the commissioners' condemnation awards to the Iowa District Court, and therefore the Railroad is precluded from removing the state court appeal to the federal court.

As previously indicated in our "Statement of the Case" herein, the Railroad, following its attempt to appeal directly from the award of the commissioners to the United States District Court, docketed an appeal from the same award to the state court of Iowa and immediately attempted to remove that action to the United States District Court. The district court, while sustaining the Landowners' Motion to Dismiss the Complaints in the direct appeal case, overruled the Landowners' Motion to Remand the removal case (R. 37-39; 107 F. Supp. 895). The United States Court of Appeals for the Eighth Circuit affirmed the dismissal of the attempted direct appeal to the United States District Court and reversed the decision of the United States District Court overruling the Motion to Remand, with directions to grant the Motion and remand the cause (R. 87, 88; 204 F. 2d 116).

On the removal question, the Court of Appeals held that the decision of this Court in *Mason City & Fort Dodge Railroad Company v. Boynton*, 204 U. S. 570, 51 L. Ed. 629, 27 S. Ct. 321, was controlling since that decision involved the right of removal by parties to a condemnation proceeding commenced under the procedural law of the State of Iowa.

The ruling of the district court on the Motion to Dismiss the direct appeals by the Railroad from the commissioners' awards was before the Court of Appeals on the appeal of the Railroad from the judgment of dismissal and the Order denying the Motion to Remand the removal case, which involved the same award of the sheriff's commissioners, was before the Court of Appeals on the Landowners' Cross-Appeal. The appeals were submitted as one case and under the circumstances the Court of Appeals properly reviewed the Order denying the Motion to Remand, although such an Order, standing alone, would not be appealable. See *Deckert v. Independence Shares Corp.*, 311 U. S. 282, 85 L. Ed. 189, 61 S. Ct. 229; *Mayflower Industries v. Thor Corp., et al.*, 3 Cir., 1950, 184 F. 2d 537; *Goldwyn Picture Corp. v. Howells Sales Co.*, 2 Cir., 1923, 287 F. 100; *Johnson v. Butler Bros.*, 8 Cir., 1947, 162 F. 2d 87; *Gray, McFawn & Co. v. Hegarty, Conroy & Co.*, 2 Cir., 1936, 85 F. 2d 516.

See also the opinion of the Court of Appeals in this case, R. pages 79 and 80 and footnote 2 on page 80, 204 F. 2d at page 118 and footnote 2 on pages 118 and 119.

We proceed to a consideration of the question of the propriety of the removal by the Railroad to the United

States District Court of the action which had been docketed by the Railroad in the state court.

Section 472.21, Code of Iowa, 1950, relating to an appeal to the Iowa district court from an award of the sheriff's commissioners, provides:

> "Appeals—how docketed and tried. The appeal shall be docketed in the name of the owner of the land, or of the party otherwise interested and appealing, as plaintiff, and in the name of the applicant for condemnation as defendant, and be tried as in an action by ordinary proceedings."

The Railroad in the present instance took an appeal from the award of the commissioners to the district court of Iowa in and for Pottawattamie County, at Avoca. Inasmuch as it is the applicant for condemnation, it would, under Iowa procedural law, Section 472.21, above, be docketed as defendant in the state court. The question now considered is whether the Railroad is entitled to remove the appeal from state to federal court under Section 1441 (*a*) of Title 28 U. S. C. A. which provides:

> "Section 1441. *Actions removable generally.*
>
> "(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State Court of which the district courts of the United States have original jurisdiction, may be removed by the *defendant* or the defendants to the district court of the United States for the district and division embracing the place where such action is pending." (Emphasis ours.)

The Landowners respectfully urge that the Railroad is the *plaintiff* in these proceedings, and, as such, is not entitled to remove. The Railroad apparently contends in this Court that if it may not maintain in the United States

District Court the action involving its direct appeal to that court from the award of the sheriff's commissioners, it may remove to such court the appeal it took to the state district court from the same award.

We respectfully call particular attention to the trend of the decisional law in restricting and limiting the jurisdiction of the federal courts on removal. See and compare *American Fire & Casualty Co. v. Finn*, 341 U. S. 6, 95 L. ed. 702, 71 S. Ct. 534. Under the express language of the removal statute the plaintiff in a proceeding is never entitled to remove to federal court a case it instituted in the state court. And even in doubtful cases removal from state to federal courts should be denied. *American Fire & Casualty Company v. Finn*, supra. See also: *Breyman v. Pennsylvania O. & D. R. Co.*, 6 Cir., 38 F. 2d 308.

In determining those instances in which suits may be removed, the removal statute has always been strictly construed and uniformly applied regardless of local law. This principle is amply illustrated in *Shamrock Oil & Gas Corporation v. Sheets*, 313 U. S. 100, 85 L. ed. 1214, 61 S. Ct. 868, and *Kloeb v. Armour & Company*, 311 U. S. 199, 85 L. Ed. 124, 61 S. Ct. 213. In the Shamrock case the plaintiff instituted his action in a state court, the amount involved being insufficient to invoke the jurisdiction of the federal court. Thereafter, the defendant filed a counterclaim, and the sum therein prayed for exceeded the requisite amount necessary to invoke the jurisdiction of the federal court. The plaintiff then sought to remove the entire cause to the federal court contending that he became a defendant when the counterclaim was filed. In

denying the contention, this court speaking through Mr. Justice Stone said, at page 104 of 313 U. S.:

> "Petitioner argues that although nominally a plaintiff in the state court it was in point of substance a defendant to the causes of action asserted in the counterclaims upon which, under Texas procedure, judgment could go against the plaintiff in the full amount demanded. (Citing cases.) But at the outset it is to be noted that decision turns on the meaning of the removal statute and not upon the characterization of the suit or the parties to it by state statutes or decisions. Mason City & Ft. D. R. Co. v. Boynton, 204 U. S. 570, 51 L. Ed. 629, 27 S. Ct. 321. The removal statute which is nationwide in its operation, was intended to be uniform in its application, unaffected by local law definition or characterization of the subject matter to which it is to be applied. Hence, the Act of Congress must be construed as setting up its own criteria, irrespective of local law, for determining in what instances suits are to be removed from the state to the federal courts."

The principle applied in the Sheets case finds its basis in a sound, logical conclusion that a party may not initiate an action under state procedure and then remove the case to federal court.

The question of the right of the Railroad to remove the appeal taken by it pursuant to the Iowa statute is not one of first impression. This court has determined the precise point adversely to the contentions of the Rock Island.

In *Mason City & Fort Dodge Railroad Company v. Boynton*, 1907, 204 U. S. 570, 51 L. Ed. 629, 27 S. Ct. 321, it was held that the landowner must be deemed to be the defendant in an Iowa condemnation proceeding as re-

spects right of removal to the federal court on the ground of diverse citizenship.

In the Boynton case the landowner appealed from the assessment and then removed the case to the federal court. The Railroad contended that such removal was improper since the landowner was not the defendant within the federal removal statute. In rejecting this contention and upholding the landowner's right to remove, the court, speaking through Mr. Justice Holmes, said:

"The question to be decided now is only whether the removal in this case can be upset on the ground that it was asked by the wrong party. The railroad company relies upon the words of the Iowa Code, § 2009, quoted above, and upon a decision of the Supreme Court of the state in a case like the present, except that the railroad was a foreign company, in which it was held that the railroad had a right to remove. Myers v. Chicago & N. W. R. Co., 118 Iowa 312, 324, 91 N. W. 1076. See also Kirby v. Chicago & N. W. R. Co., 106 Fed. 551. It is said that this court is bound by the construction given to the state law by the state court. Indeed, the above § 2009 does not need construction; it enacts, in terms, that the landowner shall be plaintiff. As the right to remove a suit is given only to the defendants therein, being nonresidents of the state, it is argued that the state decision ends the case.

"But this court must construe the act of Congress regarding removal. And it is obvious that the word 'defendant' as there used is directed toward more important matters than the burden of proof or the right to open and close * * *

"It is said the proceedings only become a case, within the meaning of the act of Congress, after the preliminary assessment and the appeal, and that then the landowner is in the position of one demanding

pay for property which he has lost. If we take a general view of the Iowa statutes, this conclusion is not correct. The railroad might have taken the appeal. If it had, the landowner would have been on the defensive in endeavoring at least to uphold the assessment, but he would have been called the plaintiff none the less. Whichever party appeals, it is not true that the landowner is seeking pay for what he has lost. By § 2011 the railroad is free to decline to take the property if it thinks the price too large. Even if, as in this case, it deposits the amount first assessed with the sheriff, the latter is not to pay it over until the determination of the appeal. § 2010. * * * Against the will of the owner the title to the land is not acquired until the case is decided and the price paid. The intent of railroad to get the land is the mainspring of the proceeding from beginning to end, and the persistence of that intent is the condition of their effect. The state is too considerate of the rights of its citizens to take from them their land in exchange for a mere right of action. The land is not lost until the owner is paid. Therefore, in a broad sense, the railroad is the plaintiff, as the institution and continuance of the proceedings depend upon its will. Hudson River R. & Terminal Co. v. Day, 54 Fed. 545."

In the light of the decision in the *Boynton* case there can be no doubt that *the Railroad in the present instance is a plaintiff* and that, as such, it had no right of removal. The *Boynton* case is cited and relied on to sustain the position of this Court in the *Shamrock* case, supra. The law as announced in the *Boynton case* is, we respectfully submit, controlling. In the face of that decision and the comparatively recent decision of this Court in the *Shamrock* case, supra, the Railroad's contention that it was entitled to remove its state court appeal is completely dispelled. See also *State of Minnesota*

v. Chicago, Milwaukee, St. Paul & Pacific R. Co., D. C. Minn., 4th Div., 1931, 50 F. 2d 430; *Rock Island Motor Transit Co. v. Murphy Motor Freight Lines*, D. C. Minn., 3rd Div., 1952, 101 F. Supp. 978. These district court decisions reiterate the precept that one seeking relief in a state tribunal or pursuant to state procedure is always a plaintiff and thus can never remove to the federal court.

In the present case the Railroad initiated the proceeding to condemn in the first instance; it also initiated the appeal from the assessment. The intent of the Railroad in this case to get the land is the mainspring of the proceedings; clearly it is the plaintiff and not the defendant within the removal law.

That the determination of the status of a party as a "defendant" within the removal statute presents a question of federal law without regard to the state statutes or decisions is recognized by the Railroad in Section III B of its brief. Indeed it argues in that section that it is the plaintiff. See page 37 of the "Brief of Petitioner." Manifestly the Railroad cannot be both a plaintiff and a defendant in the same condemnation proceeding. The Railroad admits it is a plaintiff in certain divisions of its brief. In others it says it is a "defendant" within the removal statute. This inconsistent position is apparent throughout the Railroad's brief.

In Division V of the Railroad's brief at pages 40 and 41 the Railroad argues:

> "We have already pointed out in an earlier division of this brief that petitioner was entitled to invoke the jurisdiction of the United States District

> Court either as plaintiff or defendant. It seems to us quite fundamental that if petitioner was properly denied access to the United States District Court because it was not a proper party plaintiff, that then it necessarily follows that it had a right of removal from the state court to the federal court because it was a defendant in the proceeding. * * * "

The above language of the Railroad's brief is based upon the false postulate that the Railroad was denied access to the United States District Court and that the reason for the denial was that it was not a proper party plaintiff. As a matter of fact, the Railroad was not denied access to the federal courts, it merely failed properly to invoke the jurisdiction of such courts. As previously indicated herein, the Railroad instituted a proceeding under the state procedural law and, following a verdict of the commissioners, notices of appeal to both the federal and state courts were filed by it. Neither by the direct appeal to federal court nor by the removal proceedings was federal jurisdiction invoked. In any event, the admissions in the Railroad's brief are entirely sufficient to defeat any contention that it makes in some portions thereof that it became a "defendant" within the removal statute, in the actions which it instituted in the state court by appealing thereto from the awards of the commissioners.

In urging error of the Court of Appeals in ruling on the removal question, the Railroad in Section V of its brief, at pages 41 and 42 thereof, attempts to distinguish the Boynton decision from the case presently considered, and states (incorrectly, we respectfully submit) that in this case the Railroad acquired title and possession of the land involved in the administrative pro-

ceeding before the Sheriff of Pottawattamie County, Iowa. Thus, the railroad argues that the necessity for the railroad to acquire title, referred to by Mr. Justice Holmes in his decision in the Boynton case, as the "mainspring of the proceeding" is no longer the paramount issue for determination and the status of the railroad becomes that of a defendant.

The substance of the supposed distinction is, then, that the railroad has paid the award to the sheriff thereby entitling it to the right of occupancy. We respectfully submit that this is exactly what happened in the *Boynton* case, and that there is in these cases in fact no distinction at all except that in the *Boynton* case the Landowner appealed to the state district court, and here the Railroad itself took that appeal. In the *Boynton* case the condemnor had also paid the award to the sheriff. In the statement of that case, at page 573 of 204 U. S., page 630 of 51 L. ed., it is said:

> "* * * On February 18, 1902, the commissioners were duly appointed by the sheriff and made their report assessing the owners' damages occasioned by the appropriation of his lots by the railroad company at $4,750.
>
> *"On the same day the railroad company paid the sheriff that amount of money for the use of the owner.*
>
> "Afterwards, and within the time fixed by the state statute, the owner appealed from the commissioners' awards to the District Court of Carroll County. * * *" (Emphasis ours.)

And in his opinion, Mr. Justice Holmes clearly recognized that the award had been paid to the sheriff, for he states at page 579 of 204 U. S. and page 633 of 51 L. Ed.:

> "Even if, as in this case, it deposits the amount first assessed with the sheriff, the latter is not to pay it over until the determination of the appeal."

Clearly there is no distinction between the *Boynton* case and this case nor a misconstruction of the Boynton decision by the Court of Appeals, as suggested by the Railroad.

Here, as in the Boynton case, the railroad acquired right of occupancy, *not title*, by depositing the money with the sheriff. As so tersely stated by Mr. Justice Holmes in the Boynton opinion at page 580 of 204 U. S., page 634 of 52 L. Ed.:

> "The state is too considerate of the rights of its citizens to take from them their land in exchange for a mere right of action."

For an interesting discussion of the removal question see comment on the District Court's opinion in the present case in 38 Iowa Law Review, 575-580.

The argument of the Railroad on the removal question is in direct conflict with other sections of its brief wherein it not only admits but urges that its position in these proceedings is that of a plaintiff rather than a defendant. Surely it cannot seriously contend that a plaintiff is entitled to remove its own case from the forum it selected in which to maintain it.

CONCLUSION

Reduced to simplicity, this case involves the question whether the Railroad has proceeded in such a manner as to invoke the jurisdiction of the federal court—not whether it has been denied access thereto. As succinctly stated

by Judge Collet in the opinion of the Court of Appeals denying the Petition for Rehearing herein, R. 102, 103, 204 F. 2d at pages 954, 955:

> "It may well be that if this action had been commenced in the United States District Court, that court would have had jurisdiction. But actions are not initiated in the federal courts by filing with a sheriff a request that he appoint commissioners to assess damages."

Proceedings before the sheriff are not a condition to the right to condemn. They are a procedural part of a state condemnation action. Iowa Code 1950, Chapter 472 is the general procedural chapter for condemnation in the state courts, whether the substantive right to condemn is granted by Chapter 471 or by some other statute of Iowa. (See, for example, Code 1950, Secs. 297.6, 420.52, 420.60, 420.156, 468.1 and 468.7.) Chaper 472 is in no sense tied in with Chapter 471 so as to condition the right to condemn on a proceeding before the Sheriff. The right is entirely independent of the procedural remedy to enforce it.

The Railroad made no attempt to institute an action in the federal court initially, nor to follow Rule 71A which, by specific mandate of this Court in subsection (k) thereof, is exclusively applicable in federal condemnation proceedings commenced by authority of substantive state law. The mere filing of a complaint in the federal court, in connection with the attempted appeal to that court, added nothing to the case of the Railroad. The complaint was neither intended nor filed as a separate action and there was no compliance whatever with Rule 71A as re-

quired to invoke original federal jurisdiction of person and res.

The attempted removal was entirely abortive and did not bring the state court case into federal cognizance. The Railroad voluntarily acted under state procedural law and deliberately invoked the jurisdiction of the district court of Iowa by filing the Notice of Appeal to that court. It follows that the Railroad may not now complain that it has been denied the right to have its cause determined in federal court through removal proceedings or otherwise.

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APPENDIX

The complete text of Rule 71A of the Federal Rules of Civil Procedure follows:

Rule 71A. Condemnation of Property

(a) Applicability of Other Rules. The Rules of Civil Procedure for the United States District Courts govern the procedure for the condemnation of real and personal property under the power of eminent domain, except as otherwise provided in this rule.

(b) Joinder of Properties. The plaintiff may join in the same action one or more separate pieces of property, whether in the same or different ownership and whether or not sought for the same use.

(c) Complaint.

(1) Caption. The complaint shall contain a caption as provided in rule 10(a), except that the plaintiff shall name as defendants the property, designated generally by kind, quantity, and location, and at least one of the owners of some part of or interest in the property.

(2) Contents. The complaint shall contain a short and plain statement of the authority for the taking, the use for which the property is to be taken, a description of the property sufficient for its identification, the interests to be acquired, and as to each separate piece of property a designation of the defendants who have been joined as owners thereof or of some interest therein. Upon the commencement of the action, the plaintiff need join as defendants only the persons having or claiming an interest in the property whose names are then known, but prior to any hearing involving the compensation to be paid for a piece of property, the plaintiff shall add as defendants all persons having or claiming an interest in that property whose names can be ascertained by a reasonably diligent search of the records, consid-

ering the character and value of the property involved and the interests to be acquired, and also those whose names have otherwise been learned. All others may be made defendants under the designation "Unknown Owners." Process shall be served as provided in subdivision (d) of this rule upon all defendants, whether named as defendants at the time of the commencement of the action or subsequently added, and a defendant may answer as provided in subdivision (e) of this rule. The court meanwhile may order such distribution of a deposit as the facts warrant.

(3) Filing. In addition to filing the complaint with the court, the plaintiff shall furnish to the clerk at least one copy thereof for the use of the defendants and additional copies at the request of the clerk or of a defendant.

(d) Process.

(1) Notice; Delivery. Upon the filing of the complaint the plaintiff shall forthwith deliver to the clerk joint or several notices directed to the defendants named or designated in the complaint. Additional notices directed to defendant subsequently added shall be so delivered. The delivery of the notice and its service have the same effect as the delivery and service of the summons under Rule 4.

(2) Same; Form. Each notice shall state the court, the title of the action, the name of the defendant to whom it is directed, that the action is to condemn property, a description of his property sufficient for its identification, the interest to be taken, the authority for the taking, the uses for which the property is to be taken, that the defendant may serve upon the plaintiff's attorney an answer within 20 days after service of the notice, and that the failure so to serve an answer constitutes a consent to the taking and to the authority of the court to proceed to hear the action and to fix the compensation. The notice shall conclude with the name of the plain-

tiff's attorney and an address within the district in which action is brought where he may be served. The notice need contain a description of no other property than that to be taken from the defendants to whom it is directed.

(3) Service of Notice.

(i) Personal Service. Personal service of the notice (but without copies of the complaint) shall be made in accordance with Rule 4(c) and (d) upon a defendant who resides within the United States or its territories or insular possessions and whose residence is known. The provisions of Rule 4(f) shall not be applicable.

(ii) Service by Publication. Upon the filing of a certificate of the plaintiff's attorney stating that he believes a defendant cannot be personally served, because after diligent inquiry within the state in which the complaint is filed his place of residence cannot be ascertained by the plaintiff or, if ascertained, that it is beyond the territorial limits of personal service as provided in this rule, service of the notice shall be made on this defendant by publication in a newspaper published in the county where the property is located, or if there is no such newspaper, then in a newspaper having a general circulation where the property is located, once a week for not less than three successive weeks. Prior to the last publication, a copy of the notice shall also be mailed to a defendant who cannot be personally served as provided in this rule but whose place of residence is then known. Unknown owners may be served by publication in like manner by a notice addressed to "Unknown Owners."

Service by publication is complete upon the date of the last publication. Proof of publication and mailing shall be made by certificate of the plaintiff's attorney, to which shall be attached a printed copy of the published notice with the name and dates of the newspaper marked thereon.

(4) Return; Amendment. Proof of service of the notice shall be made and amendment of the notice or proof of its service allowed in the manner provided for the return and amendment of the summons under Rule 4(g) and (h).

(e) Appearance or Answer. If a defendant has no objection or defense to the taking of his property, he may serve a notice of appearance designating the property in which he claims to be interested. Thereafter he shall receive notice of all proceedings affecting it. If a defendant has any objection or defense to the taking of his property, he shall serve his answer within 20 days after the service of notice upon him. The answer shall identify the property in which he claims to have an interest, state the nature and extent of the interest claimed, and state all of his objections and defenses to the taking of his proerty. A defendant waives all defenses and objections not so presented, but at the trial of the issue of just compensation, whether or not he has previously appeared or answered, he may present evidence as to the amount of the compensation to be paid for his property, and he may share in the distribution of the award. No other pleading or motion asserting any additional defense or objection shall be allowed.

(f) Amendment of Pleadings. Without leave of court, the plaintiff may amend the complaint at any time before the trial of the issue of compensation and as many times as desired, but no amendment shall be made which will result in a dismissal forbidden by subdivision (i) of this rule. The plaintiff need not serve a copy of an amendment, but shall serve notice of the filing, as provided in Rule 5(b), upon any party affected thereby who has appeared and, in the manner provided in subdivision (d) of this rule, upon any party affected thereby who has not appeared. The plaintiff shall furnish to the clerk of the court for the use of the defendants at least one copy

of each amendment, and he shall furnish additional copies on the request of the clerk or of a defendant. Within the time allowed by subdivision (e) of this rule a defendant may serve his answer to the amended pleading, in the form and manner and with the same effect as there provided.

(g) Substitution of Parties. If a defendant dies or becomes incompetent or transfers his interest after his joinder, the court may order substitution of the proper party upon motion and notice of hearing. If the motion and notice of hearing are to be served upon a person not already a party, service shall be made as provided in subdivision (d) (3) of this rule.

(h) Trial. If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it. If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (e) of Rule 53. Trial of all issues shall otherwise be by the court.

(i) Dismissal of Action.

(1) As of Right. If no hearing has begun to determine the compensation to be paid for a piece of property and the plaintiff has not acquired the title or a lesser interest in or taken possession, the plaintiff may dismiss the action as to that property, without an order of the court, by filing a notice of dismissal setting forth a brief description of the property as to which the action is dismissed.

(2) By Stipulation. Before the entry of any judgment vesting the plaintiff with title or a lesser interest in or possession of property, the action may be dismissed in whole or in part, without an order of the court, as to any property by filing a stipulation of dismissal by the plaintiff and the defendant affected thereby; and, if the parties so stipulate, the court may vacate any judgment that has been entered.

(3) By Order of the Court. At any time before compensation for a piece of property has been determined and paid and after motion and hearing, the court may dismiss the action as to that property, except that it shall not dismiss the action as to any part of the property of which the plaintiff has taken possession or in which the plaintiff has taken title or a lesser interest, but shall award just compensation for the possession, title or lesser interest so taken. The court at any time may drop a defendant unnecessarily or improperly joined.

(4) Effect. Except as otherwise provided in the notice, or stipulation of dismissal, or order of the court, any dismissal is without prejudice.

(j) Deposit and Its Distribution. The plaintiff shall deposit with the court any money required by law as a condition to the exercise of the power of eminent domain; and, although not so required, may make a deposit when permitted by statute. In such cases the court and attorneys shall expedite the pro-

ceedings for the distribution of the money so deposited and for the ascertainment and payment of just compensation. If the compensation finally awarded to any defendant exceeds the amount which has been paid to him on distribution of the deposit, the court shall enter judgment against the plaintiff and in favor of that defendant for the deficiency. If the compensation finally awarded to any defendant is less than the amount which has been paid to him, the court shall enter judgment against him and in favor of the plaintiff for the overpayment.

(k) Condemnation Under a State's Power of Eminent Domain. The practice as herein prescribed governs in actions involving the exercise of the power of eminent domain under the law of a state, provided that if the state law makes provision for trial of any issue by jury, or for trial of the issue of compensation by jury or commission or both, that provision shall be followed.

(l) Costs. Costs are not subject to Rule 54(d).

Effective Date. Par. 2 of Supreme Court Order adopted April 30, 1951, 71 S. Ct. XIII (XVIII), which promulgated this rule and abrogated par. (7) of Rule 81(a) of these rules, provided: "That this Rule 71A and the amendment to Rule 81(a) will take effect on August 1, 1951. Rule 71A governs all proceedings in actions brought after it takes effect and also further proceedings in actions then pending, except to the extent that in the opinion of the court its application in a particular action pending when the rule takes effect would not be feasible or would work injustice, in which event the former procedure applies."

Such order, setting out this rule and providing for the abrogation of par. (7) of Rule 81(a), was transmitted to Congress on May 1, 1951 by the Chief Justice of the United States (House Document No. 121, May 1, 1951, 82nd Cong., 1st Sess.), in conformity with section 2072 of this title. As no action was taken by Congress within the 90-day period required by that section, this rule and the abrogation of par. (7) of Rule 81(a) took effect on August 1, 1951, as provided in said order.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A.D., 1953

No. 209

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
Petitioner,

vs.

ARCHIE C. STUDE, WILLIAM LUMPKIN and POTTAWATTAMIE COUNTY, IOWA,
Respondents.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
Petitioner,

vs.

ARCHIE C. STUDE,
Respondent.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
Petitioner,

vs.

ARCHIE C. STUDE and WILLIAM LUMPKIN,
Respondents.

PETITION FOR REHEARING

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District Courts of the United States have jurisdiction only over "cases in law and equity." Such courts cannot entertain jurisdiction in purely administrative proceedings prescribed by state law. The statutes of the United States restrict the jurisdiction of the District Courts to "civil action." It is, therefore, manifest that by its decision that the Iowa eminent domain law prescribes an administrative proceeding before the county sheriff, this Court has determined that such proceeding could not have been initiated, in the first instance, in the United States District Court for the Southern District of Iowa.

I-B 10

Since petitioner was precluded from initiating its condemnation proceeding in the United States District Court, it followed the only procedure available to it; namely, to institute the condemnation proceeding before the state sheriff and then, when that proceeding was complete, to file its complaint in the United States District Court invoking the original jurisdiction of that tribunal. At that time the trial, *by commission*, required by Iowa law had already been completed and there remained only a trial of the issue of valuation, or damage, by a jury. A full compliance with the provisions of Rule 71A(a) to (g), inclusive, would have involved a useless

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duplication of mere procedural steps prescribed by state law. Since the only relief which the Federal Court could afford was by a jury trial on the issue of valuation, or damages, petitioner's complaint sought the only remedy which the Federal court could grant. It follows that petitioner's complaint was improperly dismissed.

II 12

The dismissal of petitioner's action by the District Court was predicated upon an erroneous and untenable ground. Since this Court has found no jurisdictional basis upon which to sustain such dismissal, the judgments below should be reversed and the case remanded with directions to permit petitioner to file any pertinent amendments necessary to properly bring the controversy before the District Court.

III 14

The *jurisdiction of the United States District Courts* as distinguished from the procedure to be followed in no manner is affected by the adoption of Rule 71A.

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ARCHIE C. STUDE and WILLIAM LUMPKIN,

Respondents.

PETITION FOR REHEARING

Petitioner, Chicago, Rock Island and Pacific Railroad Company, respectfully prays that a rehearing be granted in this cause, that the opinion of the majority of the Court dated January 18, 1954, be withdrawn, and that the cause be restored to the docket for re-argument; and for grounds of such petition states:

1. The opinion of the majority of the Court, filed January 18, 1954, decides every controlling question of law

presented by the case in accordance with petitioner's contentions but erroneously, we believe, affirms the judgment of the Court of Appeals for the Eighth Circuit.

Thus, the opinion of the majority holds (a) that the Iowa law of eminent domain prescribes a purely administrative procedure for the preliminary determination of damages by commissioners appointed by the sheriff and (b) that petitioner, as condemnor, is under Federal law, the plaintiff in any civil action which may be brought in the United States Courts, notwithstanding that, by state law, the landowner is plaintiff and condemnor is defendant in such action.

These points have been decided in accord with the contentions of petitioner. Since the procedure before the Iowa Sheriff is an administrative proceeding, it manifestly could not have been initiated in a United States District Court in the manner prescribed by Rule 71A, for the jurisdiction of that Court is, by the Constitution of the United States, limited to "cases in law and equity," and by Act of Congress to "civil actions." While the opinion of the majority of this Court states that the question whether petitioner could have instituted its condemnation proceeding "as an original action in the United States District Court for the Southern District of Iowa is not before us," the question, we submit, has been determined by the pronouncement of this Court that Iowa law prescribes a purely administrative proceeding before the Sheriff.

2. The opinion of the majority of the Court filed January 18, 1954, affirms the judgment dismissing petitioner's complaint not because of lack of jurisdiction in the District Court, but solely because of non-compliance with the provisions of Rule 71A. Had the District Court dismissed the action on the ground that petitioner's complaint did not

show compliance with Rule 71A, petitioner could and would have sought leave to amend its complaint so as to comply with such procedural rule. The opinion, however, sustains the judgment of dismissal without giving petitioner an opportunity to comply with procedural rules. If petitioner failed to state its cause of action in accordance with the requirements of Rule 71A but did state a cause of action within the jurisdiction of the District Court, the judgment of the courts below should be reversed and the cause remanded with directions to permit petitioner to amend its complaint.

3. The opinion of the majority of the Court filed January 18, 1954, has erroneously, we believe, affirmed a judgment of dismissal based upon a lack of jurisdiction in the United States District Court, solely on the ground of a failure to comply with the provisions of Rule 71A. Petitioner's complaint did comply with all pertinent requirements of Rule 71A, and it was not subject to dismissal upon the grounds stated in the opinion of the majority of this Court.

In support of this petition for rehearing, petitioner submits the following authorities and argument.

BRIEF POINTS IN SUPPORT OF PETITION FOR REHEARING

I.

A.

District Courts of the United States have jurisdiction only over "cases in law and equity." Such courts cannot entertain jurisdiction in purely administrative proceedings prescribed by state law. The statutes of the United States restrict the jurisdiction of the District Courts to "civil actions." It is, therefore, manifest that by its decision that the Iowa eminent domain law prescribes an administrative proceeding before the county sheriff, this Court has determined that such proceeding could not have been initiated, in the first instance, in the United States District Court for the Southern District of Iowa.

Constitution of the United States, Article III, Section 2.

Title 28, Section 1332, U.S.C.A.

B.

Since petitioner was precluded from initiating its condemnation proceeding in the United States District Court, it followed the only procedure available to it; namely, to institute the condemnation proceeding before the state sheriff and then, when that proceeding was complete, to file its complaint in the United States District Court invoking the original jurisdiction of that tribunal. At that time the trial, *by commission,* required by Iowa law had already been completed and there remained only a trial of the issue of valuation, or damage, by a jury. A full compliance with the provisions of Rule 71A(a) to (g), inclu-

sive, would have involved a useless duplication of mere procedural steps prescribed by state law. Since the only relief which the Federal court could afford was by a jury trial on the issue of valuation, or damages, petitioner's complaint sought the only remedy which the Federal court could grant. It follows that petitioner's complaint was improperly dismissed.

II.

The dismissal of petitioner's action by the District Court was predicated upon an erroneous and untenable ground. Since this Court has found no jurisdictional basis upon which to sustain such dismissal, the judgments below should be reversed and the case remanded with directions to permit petitioner to file any pertinent amendments necessary to properly bring the controversy before the District Court.

Rule 15, Federal Rules Civil Procedure.

III.

The *jurisdiction of the United States District Courts* as distinguished from the procedure to be followed in no manner is affected by the adoption of Rule 71A.

Constitution of the United States, Article III, Section 2.

Rule 82, Federal Rules of Civil Procedure.

ARGUMENT

I.

A.

The opinion of a majority of the Court on its face has not decided whether petitioner might have instituted its condemnation proceeding initially in the United States District Court in accordance with the provisions of Rule 71A, Federal Rules of Civil Procedure. The opinion merely says that such question "is not before us," but tacitly assumes that petitioner's proceeding might properly have been started in the District Court.

The majority opinion of the Court states:

> "The proceeding before the sheriff is administrative until the appeal has been taken to the district court of the county. Then the proceeding becomes a civil action pending before 'those exercising judicial functions' for the purpose of reviewing the question of damages. *Myers* v. *Chicago & N.W. R. Co.*, 118 Iowa 312, 315-316, 91 N.W. 1076, 1078. When the proceeding has reached the stage of a perfected appeal and the jurisdiction of the state district court is invoked, it then becomes in its nature a civil action and subject to removal by the defendant to the United States District Court. *Boom Co.* v. *Patterson*, 98 U.S. 403, 407."

The dissenting opinion of Mr. Justice Frankfurter states that the railroad "was unquestionably entitled to do (so) since there was diversity of citizenship, *Madisonville Traction Co.* v. *Mining Co.*, 196 U.S. 239."

It is apparent that we have signally failed to make our position plain to the members of this Court. From the outset of this proceeding, we have contended that, since the

eminent domain proceeding prescribed by the Iowa statutes is purely administrative, and not a "civil action," such administrative proceeding is not within the jurisdiction of the District Courts of the United States. This question has been ignored, both in the majority and dissenting opinions, and we submit that it is of controlling importance. All members of the Court agree that the Iowa eminent domain proceeding before the sheriff is an administrative inquest.

Article III, Section 2, United States Constitution, provides:

> "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, of which shall be made, under their authority; * * * to controversies between citizens of different states."

The original jurisdiction of United States District Courts is prescribed by Title 28, Section 1332, U.S.C.A., and is limited to "civil actions."

Having decided that the eminent domain proceeding under Iowa law is administrative in character, we think this Court has, of necessity, decided that the administrative proceeding could not have been initially instituted in the United States District Court. This is true because the proceeding is not judicial in character—not a "case in law or equity."

The distinction between an administrative proceeding before a board, a commission, or a tribunal, and a "civil action" triable in the courts has always heretofore been recognized by this Court in eminent domain cases. The first case in which it was recognized was the early decision of *Mississippi & Rum River Boom Co.* v. *Patterson*, 98 U.S.

403, 25 L.Ed. 462, in which Mr. Justice Field in speaking for this Court said:

> "The proceeding in the present case before the commissioners appointed to appraise the land was in the nature of an inquest to ascertain its value, and not a suit at law in the ordinary sense of these terms. But when it was transferred to the District Court by appeal from the Award of the commissioners, it took, under the statute of the State, the form of a suit at law, and was thenceforth subject to its ordinary rules and incidents. The point in issue was the compensation to be made to the owner of the land; in other words, the value of the property taken."

This rule has been consistently followed by this Court. In *Searl* v. *School District*, 124 U.S. 197, 31 L.Ed. 415, it is held that a proceeding under the state law of eminent domain in the state courts, before judicial officers was a "judicial action" and, therefore, could be instituted in the first instance in an appropriate United States District Court. In *Madisonville Traction Co.* v. *St. Bernard Mining Co.*, 196 U.S. 239, 49 L.Ed. 462, the writer of the opinion took great pains to point out that, under Kentucky law, eminent domain cases were initiated in the courts of the state and heard before judicial officers. This court speaking by Mr. Justice Harlan there said:

> "The case, as made in the county court, was, beyond question, a judicial proceeding; it related to property rights; the parties are corporate citizens of different states; and the value of the matter in dispute exceeded the amount requisite to give jurisdiction to the circuit court. It was, therefore, a proceeding embraced by the very words of the Constitution of the United States, which declares that the "judicial power shall extend . . . to controversies . . . between citizens of different states," as well as by the act of 1887 (Sec. 1),

> which declares "that the circuit courts of the United States shall have *original* cognizance, concurrent with the courts of the several states, of *all* suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000, . . . in which there shall be a "controversy between citizens of different states." In view of these explicit provisions it is clear that the proceeding in the county court was a suit or controversy within the meaning both of the Constitution and of the judiciary act. We could not hold otherwise without overruling former decisions of this court."

Prior to the decision in this case the Eighth Circuit Court of Appeals had followed the rule of this Court as shown by the cases of *Des Moines Water Co. v. City of Des Moines*, 206 Fed. 657 (C.A.8th); and *Kaw Valley Drainage District v. Metropolitan Water Co.*, 186 Fed. 315 (C.A.8th).

We cannot believe that this Court intends to hold, for a moment, that an administrative proceeding prescribed by state law may be initiated in a District Court of the United States, when diversity of citizenship and jurisdictional amount exist; yet the majority of the Court seems to have held just this.

We submit, therefore, that the decision of this Court that the proceeding is administrative in character is determinative of the question here presented. Having decided that the proceeding before the Iowa Sheriff is a mere administrative inquest, it necessarily follows that such proceeding was not within the jurisdiction of the United States District Court, and that petitioner was necessarily confined to state procedure at the inception of its eminent domain proceeding. This is of controlling importance because, if petitioner was precluded from initiating its

condemnation proceeding in the United States District Court, then the procedure to be followed under Rule 71A when the case was brought in the United States District Court would necessarily have to take into account what had transpired in the state administrative tribunal. The allegations to be included in a complaint in the Federal Court would necessarily be dependent on the remedy which that court could afford.

B.

In the foregoing division we have pointed out that petitioner filed its complaint in the United States District Court for Southern Iowa at the earliest permissible time. The state administrative procedure was complete, and, with respect to the Stude property, petitioner was in possession of the land by virtue of the proceedings had under state law. It was faced with an exorbitant and excessive award of damages. The only question left for determination in a civil action was the amount of damages to be paid. The only relief which it could receive at the hands of any court, either state or Federal, was a determination of the amount of its liability. Under Iowa law, which was controlling on the rights of the parties, that was the only justiciable issue presented.

Petitioner included in its complaint as required by Rule 71A(c)(2) a short and plain statement of the authority for taking the land, the use for which the property was to be taken, a description of the property owned by defendant, a description of the property taken, and a designation of owner and tenant, as defendants. Petitioner's complaint included allegations with respect to the administrative steps taken and the completion of that procedure. The relief sought was that the damages be fixed and that plaintiff have such further relief as may be just and proper.

No occasion existed for petitioner to comply with the provisions of Rule 71A(d) to (g). Compliance with those provisions would have been a useless gesture. Under Rule 71A(k) it was necessary that state law be followed on trial of the issue of compensation. The trial *by commission* prescribed by state law had already taken place. Surely petitioner was not required to disregard the state administration proceeding which was, at the outset, its sole and only remedy, and have the damages again determined by a commission in the United States District Court. Yet the majority opinion requires exactly this. The only relief petitioner desired and the only relief which the court could grant was a determination of the amount of damages. Petitioner's complaint, therefore, simply asked the court to grant it such relief. We submit that viewed in this light, petitioner's complaint makes sense, and that to have attempted any other means of complying with the provisions of Rule 71A would merely have obscured the issue and would have served no useful purpose.

Petitioner did serve a notice of appeal from the award made by sheriff's commissioners, but that was merely a compliance with the requirements of the state administrative procedure. The notice of appeal was essential under state law to convert the proceeding into a "civil action." Incidentally, it is to be noted that the notice of appeal did not recite that the appeal was taken to the United States District Court; it recited merely that the appeal would be docketed there on or before a day certain. Furthermore, it is to be noted that petitioner was named as plaintiff. Plaintiff was condemnor, but it was not designated as defendant as required by the state statute. If the proceeding in the United States District Court was merely an appeal to that tribunal from the award of sheriff's com-

missioners, was not the notice of appeal itself sufficient process to give the court jurisdiction? Petitioner caused a summons to be issued and served by the Marshal on all interested parties.

In short, petitioner's complaint complied with every jurisdictional requirement in initiating a civil action in the United States District Court. It stated all essential allegations required by Rule 71A(a) to (c), inclusive, and it sought the only relief which the court had power to grant. Petitioner's complaint, therefore, clearly stated a cause of action. True it is that that cause of action arose by virtue of rights granted by the state law of eminent domain. The very right to resort to the court at all under Iowa law was dependent upon a prior administrative proceeding before the county sheriff.

Iowa law was the sole authority for the proceeding. The jurisdiction of the United States District Court was, we submit, properly invoked. The majority opinion of this Court does not intimate that the complaint was properly dismissed because petitioner had filed its administrative proceeding before the sheriff. It follows, therefore, that the judgment of the District Court dismissing petitioner's complaint on that sole ground was erroneous and the judgment of the Court of Appeals was equally erroneous. We submit that under any view of the case, petitioner's complaint was sufficient to invoke the jurisdiction of the United States District Court and no reason exists for denying to petitioner the right to have its case there tried.

II.

As we have heretofore pointed out, the District Court for Southern Iowa sustained respondents' motion to dismiss the action on the sole ground that by commencing the

administrative proceeding before the Pottawattamie County Sheriff, petitioner thereby elected to proceed exclusively before state tribunals, and could not, when the case became a civil action, invoke Federal jurisdiction. It is significant that this court, while it has affirmed the judgment of the two courts below, has predicated such affirmance upon petitioner's failure to literally comply with the requirements of Rule 71A Federal Rules of Civil Procedure. The majority opinion does not point out any *lack of jurisdictional allegations* with respect to the complaint; it merely sustains the judgments below upon entirely different grounds.

Had Judge Riley's ruling been predicated upon any insufficiency of the allegations of our complaint other than jurisdictional allegations, petitioner could and would have supplied the lack by amendment. Obviously in view of the opinion filed by Judge Riley, the complaint was not subject to amendment, because, under his view, the mere fact that the administrative proceeding had been started before the County Sheriff barred petitioner from his court. A majority of this Court now holds that petitioner's complaint was properly dismissed because the allegations of the complaint would not sufficiently comply with Rule 71A.

We submit that petitioner's complaint contained all essential jurisdictional allegations and that if the case stated by the complaint was within the jurisdiction of the District Court, then this court should reverse the judgments of the courts below and remand the case with directions to permit petitioner to amend its complaint. Such procedure is in accord with the privilege universally granted to a plaintiff who through inadvertence fails to fully plead the facts of his case, but who has properly invoked the jurisdiction of the court. Such procedure would be in accord with the Federal Rules of Civil Procedure, and particularly Rule 15.

We believe that this is a proper case for application of such rule.

III.

The majority opinion of the Court points out that:

> "petitioner's right to take the land and the ensuing right (of the owner) to damages here spring from the exercise of the power of eminent domain. The petitioner here seems to ignore the means by which it obtained the land and seeks to review only the question of damages. It may not separate the question of damages and try it apart from the substantive right from which the claim for damages arose. Nor can it be said that petitioner has fully exercised its power of eminent domain, leaving nothing to be determined but the question of damages."

We are not sure that we fully understand the implications of the statement quoted above, but, as we understand it, the Court holds that the determination of damages is but a part of the whole eminent domain proceeding and that the administrative proceeding to acquire rights under eminent domain cannot be separated from the procedural requirements for determining damages. We may concede that this would be true if the condemnation proceeding were governed by a federal law which conferred the right of eminent domain upon a particular governmental agency or a public service corporation and prescribed the method to be followed to procure such right.

In the case at bar, however, the state of Iowa, by its legislature, has prescribed an administrative proceeding for the taking of the property and securing to the condemnor its possession. That proceeding, in the event either party thereto be aggrieved by the amount of damages awarded, may be converted into a civil action "triable by ordinary proceedings." The administrative proceeding is

not within the jurisdiction of a United States Court. The civil action for determination of damages is a "civil action," and we can perceive no obstacle which will prevent a non-resident condemnor from commencing that civil action in a District Court of the United States when diversity of citizenship and jurisdictional amount are present.

It seems to us quite plain that Rule 71A, being a mere procedural rule promulgated by order of this Court, cannot broaden the jurisdiction of the District Courts of the United States. Administrative proceedings are neither "civil actions" nor "cases in law or equity" under the Constitution of the United States.

The quoted portion of the majority opinion which we have set forth above, we believe, disregards the essential provisions of the Iowa law on the subject of eminent domain. If petitioner can be said to have attempted a separation of the question of damages apart from the substantive right from which the claim for damages arose, it is simply because the state statutes have created that separation, making the one the subject of an administrative proceeding, while the other may be pursued in a civil action.

CONCLUSION

A reading of the opinions of this Court indicates that what we regard as the controlling question has been disregarded. It is elementary and fundamental that an administrative proceeding before state officers prescribed by statute is not the subject of a civil action within the meaning of Title 28, Sec. 1332, U.S.C.A. If we are correct in this statement, it follows that the only procedure open to petitioner when it inaugurated its condemnation proceeding was to follow the Iowa law and institute the administrative action which that law prescribed. Having taken that

step and being aggrieved by the award of damages returned by sheriff's commissioners, it was given by state law the right to have the amount of damages determined in a "civil action." These rights were all creatures of state law; but when the State of Iowa prescribed a "civil action" for the determination of the amount of damages, petitioner, by reason of diversity of citizenship and jurisdictional amount, was entitled to institute that "civil action" in the District Court of the United States. If there was a separation of administrative and judicial functions at different stages of the same proceeding, it was simply due to the requirements of state law.

We submit that petitioner's complaint as filed in the United States District Court was sufficient to invoke Federal jurisdiction; that since the administrative proceeding —the trial of the issue of damages by commission—had already taken place in the state proceeding, the only issue before the court was that of damages. If there be any defect or insufficiency in petitioner's complaint, it was not a jurisdictional defect, but one which was subject to correction by amendment.

We earnestly urge that petitioner is entitled to try this case, and its companion cases, in the United States District Court, and we respectfully ask that a rehearing of this cause be granted.

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CERTIFICATE OF COUNSEL

The undersigned counsel for petitioner does hereby certify that the above and foregoing petition for rehearing is presented in good faith and not for delay, and that I believe that the same merits the careful consideration of the Court.

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IN THE

Supreme Court of the United States

October Term, A. D. 1953

No. 550

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Petitioner*,

vs.

ARCHIE C. STUDE, WILLIAM LUMPKIN and POTTAWATTAMIE COUNTY, IOWA, *Respondents*.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Petitioner*,

vs.

ARCHIE C. STUDE, *Respondent*.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Petitioner*,

vs.

ARCHIE C. STUDE and WILLIAM LUMPKIN, *Respondents*.

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IN THE

Supreme Court of the United States

October Term, A. D. 1953

No. 209

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Petitioner*,

vs.

ARCHIE C. STUDE, WILLIAM LUMPKIN and POTTAWATTAMIE COUNTY, IOWA, *Respondents*.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Petitioner*,

vs.

ARCHIE C. STUDE, *Respondent*.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Petitioner*,

vs.

ARCHIE C. STUDE and WILLIAM LUMPKIN, *Respondents*.

RESPONSE TO PETITION FOR REHEARING

ARGUMENT

I.

Administrative proceedings before sheriff's commissioners are not part of the substantive right to condemn under Iowa law.

Once again we are called upon to refute the same contention that the Petitioner has made unsuccessfully before three courts. Examination of the Petition for Rehearing reveals that the contention presented by the Petitioner is that it was required to follow the Iowa admin-

istrative procedure before the Sheriff before it had a right to condemn. In other words Petitioner insists that it could not maintain a federal court action without first following Iowa procedural law through the point of the award of the Sheriff's Commissioners. The Petitioner's theory has been and still is that there can be no "civil action" of federal cognizance until the state procedure is followed to the point of an appeal from the award. And once again the Petitioner attempts to sustain its position by citation of *removal* cases only as authority.

As we have so many times pointed out, in this court, as well as in the lower courts, the Petitioner confuses a substantive right or cause of action with the term "civil action" as used in the removal statute. It is true there can be no "civil action" pending in a state court for the purposes of removing a condemnation proceding to the federal court, until the state proceeding reaches the point of judicial as distinguished from administrative status. But it does not follow that a condemnation case brought to enforce a power granted by the state substantive law may not be initiated in the federal court.

Under the procedure in the federal court as set forth in Rule 71A the substantive right or cause of action is docketed in the manner as set forth in Rule 71A as an action in rem against the land as to which notices are given, and thereafter there is a preliminary determination of the amount of damages. There is nothing unique about this method of procedure that cannot be complied with in the federal courts, since the procedure in substance is no different than that of referring a matter to a referee or any other type of preliminary determination. The fact

remains that a condemnation suit is a suit at common law of which the federal district courts have jurisdiction. This Court in an early declaration in the case of *Kohl vs. United States*, 91 U. S. 367, held that the fact that a condemnation proceeding is a suit admits of no question.

The Petitioner's position that it had no right to proceed in federal court until after the award of the sheriff's commissioners had been returned, could have validity only if the procedure before the sheriff was a condition to the right to condemn as distinguished from a mere integral part of the state remedy to enforce the power of condemnation granted to petitioner.

The State of Iowa has, by various statutes, granted to various entities the substantive right to condemn Iowa land for specified purposes. Among the Iowa statutes granting such power are those included in Chapter 471 of the Iowa Code of 1950 entitled, "EMINENT DOMAIN," which relates exclusively to the right to condemn. Certain sections of this chapter grant the right of condemnation to railroads which have satisfied the conditions imposed by the particular sections applicable thereto (Code Iowa 1950—Secs. 471.6-471.10, inclusive).

An entirely separate chapter of the Iowa Code sets out the *procedure* for condemnation in Iowa to enforce in the state courts the substantive rights of condemnation granted by the state including, but not limited to the substantive rights granted by Chapter 471. This remedial chapter is Chapter 472 of the Iowa Code of 1950 entitled, "PROCEDURE UNDER POWER OF EMINENT DOMAIN." Under the specific provisions of Sec. 472.1, the state procedure for condemnation, except as otherwise

provided "shall be in accordance with the provisions of this chapter." Hence the procedural remedy of Chapter 472 of the Iowa Code applies not alone to railroads but to all condemnors. Likewise, it applies not only to those given the right of condemnation by Chapter 471 but also to those given that substantive right by other Iowa statutes. See, for example, Code Iowa 1950, Secs. 297.6, 420.52, 420.60, 420.156, 468.1 and 468.7. In other words, Chapter 472 is in no sense tied in with Chapter 471 so as to condition the right or power to condemn on the maintenance of a proceeding before the sheriff. The right is entirely independent of the procedural remedy to enforce it.

In this instance the Petitioner proceeded under the power granted it by Sec. 471.9(3) and 471.10 of the Code of Iowa of 1950. Under the latter section, a railroad before instituting condemnation proceedings under Sec. 471.9 is required to apply in writing to the Iowa State Commerce Commission for permission to condemn. The Commission is required to give notice to the landowners and examine into the matter and report by certificate to the Clerk of the District Court of the county in which the land is situated, the amount and description of the additional land necessary for railroad use. Sec. 471.10 then provides: "whereupon the company shall have the power to condemn lands so certified by the Commission."

In this case the Petitioner having satisfied the above requirement and having received the authority of the Iowa State Commerce Commission to condemn could, we respectfully submit, immediately institute the proceeding, either under state or federal procedure. But the Petitioner could not start under state practice before the sher-

iff and then cut across to the federal court by way of an appeal from the award of the sheriff's commissioners and thereby obtain federal review of the award of the commissioners. That is exactly what the Petitioner attempted to do. That is what the decision of this court says it may not do. The power to condemn became absolute when the Petitioner received the approval of the Iowa State Commerce Commission. There is no requirement as a condition to the right to condemn under Iowa law that the matter of damages be submitted to Sheriff's Commissioners before the substantive right exists.

II.

Condemnation under Iowa law involves a single cause of action and cannot be separated into a proceeding for acquiring the land and a proceeding for determining damages.

It is apparent that Petitioner has attempted to separate the procedure under Iowa law into two separate actions, one of which is an administrative action and is not within the jurisdiction of the Federal Court, and the other is the appeal which Petitioner claims is subject to the jurisdiction of the Federal Court. The fact is that the entire substantive right of action is set forth in Chapter 471 of the Code of Iowa, 1950, I. C. A., and involves a single substantive right, which under Iowa procedure is enforced by a preliminary administrative proceeding and thereafter the docketing of a civil action by way of appeal. The federal procedure set forth in 71A provides for the docketing of the civil action before the preliminary assessment is made. Therefore, there is only a single substantive right or cause of action which cannot be separated, as the Petitioner has attempted to do. At all

stages the proceeding remains a condemnation action. Petitioner cannot appeal from the award, which would otherwise be final under State law, directly to the federal district court.

As stated in *Mason City and Fort Dodge Railroad Company vs. Boynton*, 1907, 204 U. S. 570, 579, 580:

> "• • • Even if, as in this case, it deposits the amount first assessed with the sheriff, the latter is not to pay over until the determination of the appeal. Section 2010 (Code of Iowa, 1950, I. C. A., Sections 472.25, 472.28, 472.29).
>
> • • • • •
>
> "Against the will of the owner the title to the land is not acquired until the case is decided and the price paid. The intent of railroad to get the land is the mainspring of the proceedings from beginning to end, and the persistence of that intent is the condition of their effect. The state is too considerate of the rights of its citizens to take from them their land in exchange for a mere right of action. *The land is not lost until the owner is paid.*" (Emphasis added.)

The procedure for acquiring title by a condemnor is set forth in Section 472.36, Code of Iowa, 1950, I. C. A., which directs the clerk of the district court to file copies of the record entries as to the amount of damages and a statement showing the payment of the amount set. Section 472.41, Code of Iowa, 1950, I. C. A., provides that such record shall be presumptive evidence of title in the condemnor.

Furthermore, Section 472.32, Code of Iowa, 1950, I. C. A., also provides that upon being furnished with a copy of the assessment as determined on appeal the sher-

iff may remove the condemnor from the premises unless the amount is forthwith paid. Section 472.34 further provides that should the applicant decline to pay the final award he shall pay in addition to the costs and damages actually suffered by the landowner, reasonable attorney's fees to be taxed by the Court.

It follows that the Complaint filed by Petitioner is not a simple civil action for damages. Of necessity, Petitioner's Complaint is an appeal, since under the Iowa law set forth Section 472.17, Code of Iowa, 1950, I. C. A., the appraisement of damages returned by the Commissioners is final unless appealed from. Also, in the opinion by Mr. Justice Holmes in the Boynton case, supra, this Court analyzes the question of condemnation generally and the Iowa statutes specifically, and points out that a condemnation proceeding is a unique type of action and that both parties are actors and that it is not true that only the element of damages is involved.

The complaint in this case can be viewed only as an attempted appeal to review an award of damages made by the Sheriff's Commissioners. Under the above Iowa procedural statutes the award of damages by the Sheriff's Commissioners becomes final in the absence of an appeal. Obviously the petitioner had in mind perfecting an appeal. Otherwise the commissioners' award would become final. It is true the Petitioner, realizing the weakness of its position, likewise took an appeal to the state court which would have the effect of staying the finality of the award, but the nature of the complaint herein must be determined without regard to the other attempted appeal and removal which has apparently now been fully abandoned.

Furthermore a condemnor does not obtain title to the land condemned until the payment is made to the landowner. Condemnation is not completed until the landowner is paid and the title passes to the condemnor.

An examination of the complaint filed by the Petitioner herein discloses that, stripped of its references to the administrative procedure, it alleges nothing and seeks no relief. It is tied up to the Sheriff's proceedings and regardless of what it is called, it seeks merely to review the amount of the commissioners' award. It recognizes title as remaining in the landowners and thereby recognizes that the condemnation has not been completed. Even if, as Petitioner contends, this were merely an in personam action involving a determination of amount of damages, and even if the federal courts had jurisdiction of such an action, still the award of the Sheriff's Commissioners became final and the action in federal court would be moot.

CONCLUSION

We respectfully submit that there is nothing in the Petition for Rehearing that has not been urged continuously by the Petitioner and that has not been fully considered in all the courts, and decided by the courts. And each court, including this one, has found Petitioner's position to be untenable. The Petition for Rehearing points to no error in the decision of this court, and there is none. Contrary to the contention of Petitioner, this court did not disregard any controlling questions involved. The court merely refused to adopt the Petitioner's theory that because state procedural law provides for an admin-

istrative proceeding before a condemnation case is lodged in the state district court, the administrative proceeding is a condition precedent to the enforcement of the power of eminent domain in the federal court. *Iowa provides state procedural law and the United States provides federal procedure. Neither has provided for an appeal to the federal court from an award of the Sheriff's Commissioners made in a state initiated condemnation proceeding.* The commissioners' award is a step prescribed in state enforcement of the substantive right of condemnation, not a condition limiting the right to condemn.

We respectfully submit that the petition for rehearing should be overruled and rehearing denied.

Respectfully submitted,

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